No. 1671

Office-Supreme Court, U.S.
FILED
JUN 6 1957
JOHN T. FEY, Clerk

TRANSCRIPT OF RECORD

* *

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

NO. 1671

MILTON J. HARRIS,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

* *

UNITED STATES OF AMERICA
UNITED STATES COURT OF APPEALS, FIFTH
JUDICIAL CIRCUIT.

PLEAS AND PROCEEDINGS had and done at a regular term of the United States Court of Appeals for the Fifth Circuit, begun on the first Monday, in October, A. D. 1956, before the Honorables Elbert P. Tuttle, Warren L. Jones and John R. Brown, Circuit Judges:

MILTON J. HARRIS,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

BE IT REMEMBERED, That heretofore, to-wit on the 25th day of July, A. D., 1956, a transcript of the record in the above styled cause, pursuant to an appeal from the United States District Court for the Southern District of Florida, was filed in the office of the Clerk of the said United States Court of Appeals for the Fifth Circuit, said appeal havingg been docketed on the 28th day of April, A.D. 1956 in said Court of Appeals as No. 16074, as follows, to-wit:-

* * * * * * *

UNITED STATES

COURT OF APPEALS

FIFTH CIRCUIT.

No. 16,074

MILTON J. HARRIS,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(ORIGINAL RECORD RECEIVED JUL. 25/56)

U. S. COURT OF APPEALS

FILED

DEC 1 1956

John A. Gaston, Jr.

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INDICTMENT filed February 27, 1953, in the words and figures as follows:

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF FLORIDA.

UNITED STATES OF AMERICA,

versus No. 8441-M-CR.

MILTON J. HARRIS.

The Grand Jury Charges:

That on or about the 5th day of March, 1947, in the Southern District of Florida, Milton J. Harris, late of Miami Beach, Florida, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1946, by filing and causing to be filed with the Director (formerly Collector) of Internal Revenue for the Internal Revenue Collection District of Florida, at Jacksonville, Florida, a false and fraudulent income tax return wherein he stated that his net income for said calendar year was a net loss of $4,839.47, and that the amount of tax due and owing thereon was nothing, whereas, as he then and there well knew, his net income for the said calendar year was the sum of $26,277.23, upon which said net income he owed to the United States of America an income tax of $9,797.89

In violation of Section 145(b), Internal Revenue Code; 26 U.S.C., Section 145(b).

A True Bill.

(Illegible),
Foreman.

EMORY S. AKERMAN,
Special Assistant to the Attorney General.

FRED. BOTTS,
Asst. United States Attorney.

MOTION FOR BILL OF PARTICULARS and supporting affidavit filed March 25, 1953, in words and figures as follows:

(Title Omitted.)

The defendant moves the Court to require the United States of America to file herein, and as part of the indictment in this Cause, a Bill of Particulars as to each count, respectively, in the indictment setting forth the following facts:

1. The nature or kind of each item and the amount of each claimed by the Government as making up the total gross income claimed by the Government to have been received by the Defendant in the year 1946.

2. The type and amount of each deduction against the total gross income of the defendant for the year 1946, allowed in computing the alleged net income of defendant for said year;

3. The type and amount of each deduction by defendant in his income-tax return for the year 1946, which has been disallowed in computing the alleged net income of defendant for said year.

4. Whether it is claimed that defendant wilfully withheld or omitted from his income-tax for the year 1946, item and amount of income, and if so, the nature and kind and the amount of each claim.

5. Whether it is claimed that defendant wilfully and knowingly deducted from his gross income for the year 1946, items which were not legally deductible, and if so, the nature or kind of such illegal deductions and the amount of each such item.

Attached hereto and made a part is an affidavit executed by defendant in support of his motion.

BLACKWELL, WALKER & GRAY,
By CLEMENS J. EHRLICH,
Attorneys for Defendant.

First Federal Bldg.,
Miami 32, Florida.

State of Florida,
County of Dade, ss:

This day personally appeared before me, the undersigned authority, Milton J. Harris, who, being first duly sworn, deposes and says as follows:

1. That he is the defendant in an indictment returned by the Grand Jury, said indictment being the subject of the case of United States of America vs. Milton J. Harris, case number 8441-M.

2. That the indictment does not show nor has affiant ever been informed of, his specific charges which are the subject of such indictment.

3. That affiant has been given the impression, though he does not know, that the said charges which are the subject of said indictment pertain to transaction by a corporation known as the M. J. Harris Company, Inc.

4. That the affiant has never been informed, and, therefore, does not know which of any sales or income are the subject of said indictment, the source of said income to whom sales were made, if subject of said indictment, what real estate was involved, and what purchase price was alleged to have been received with respect to any such sale, if that is the subject of the said indictment.

5. That because affiant has not been informed of the details concerning any of the income in the alleged transaction or transactions, which forms the subject matter of said indictment, he is unable adequately to prepare his defenses.

(S.) MILTON J. HARRIS.

Sworn to and subscribed before me this 16 day of September, A.D., 1953.

(S.) MARY ANN LOMBARDO,
Notary Public, State of Florida
at Large.

My commission expires: December 14, 1956.

State of Florida,
County of Dade, ss:

This day personally appeared before me, the undersigned authority, Beatrice Winick, who, being first duly sworn, deposes and states that she is an employee of the law firm of Blackwell, Walker & Gray, attorneys for the defendant Milton J. Harris, and that at their direction and on their behalf she served a copy of the foregoing Motion for Bill of Particulars and Affidavit, upon James L. Guilmartin, Esq., United States Attorney, P. O. Box 928, Miami 6, Florida, that being the correct post office address of said attorney, and after sealing said envelope and affixing thereto sufficient postage stamps to carry it to its destination she deposited said envelope, containing the said copies, in the United States Post Office Letter Box or receptacle, in the First Federal Building, in the City of Miami, Florida, on the 16 day of September, 1953.

(S.) BEATRICE WINICK.

Sworn to and subscribed before me this 16 day of September, 1953.

(S.) MARY ANN LOMBARDO,
Notary Public, State of Florida
at Large.

My commission expires: December 14, 1956.

ORDER GRANTING BILL OF PARTICULARS entered March 16, 1955, in words and figures as follows:

(Title Omitted.)

This Cause coming on to be heard upon the motions of the defendant to dismiss indictment, for the production

of record of oath to witness before Grand Jury, and for bill of particulars, and after having heard argument of counsel, and being otherwise fully advised in the premises, it is thereupon

Considered, Ordered and Adjudged as follows:

1. That motions of defendant to dismiss the indictment, and for the production of record of oath to witness before Grand Jury, are hereby denied;

2. That motion of defendant for bill of particulars is hereby granted, and the plaintiff, United States of America, shall submit to the defendant particulars in the following form and substance:

(a) The general category and amount in each general category making the gross income alleged to have been received by the defendant for the calendar year 1946;

(b) The general category and amounts allowed or disallowed by the Government in determining the net income which is charged against the defendant. Included in this shall be personal expenses allowed or disallowed, stated in a general category.

Done and Ordered at Miami, Florida, this 15th day of March, 1955.

(S.) EMETT C. CHOATE,
District Judge.

MOTION REQUIRING GOVERNMENT TO FILE BILL OF PARTICULARS, filed March 16, 1955, in words and figures as follows:

(Title Omitted.)

Comes now the Defendant by and through his undersigned attorneys and respectfully moves the Court for an order requiring the Government to file its Bill of Particulars herein, and shows unto the Court as follows:

1. That on the 11th day of March, 1955, this Court entered an Order in this cause requiring the Government to submit to the Defendant a Bill of Particulars in the following form and substance:

"(a) The general category and amount in each general category making the gross income alleged to have been received by defendant for the calendar year 1946;

"(b) The general category and amounts allowed or disallowed by the Government in determining the net income which is charged against the defendant. Included in this shall be personal expenses allowed or disallowed, stated in a general category."

2. That the Defendant cannot properly prepare his defense until the Bill of Particulars has been filed and it further will be necessary for the Defendant, after filing the said Bill of Particulars, to have reasonable time necessary to prepare the defense of this case.

BLACKWELL, WALKER & GRAY,

First Federal Building,
Miami, Florida.

CLAUDE PEPPER LAW OFFICES,

37 N. E. First Avenue,
Miami, Florida.

By ARTHUR B. CUNNINGHAM.

It Is Hereby Certified that a true and correct copy of the above and foregoing Motion was, this 5th day of October, 1955, mailed to the office of United States Attorney James L. Guilmartin, United States Post Office Bldg., Miami, Florida.

ARTHUR B. CUNNINGHAM.

ORDER Requiring Government to file Bill of Particulars, entered November 14, 1955, in words and figures as follows:

(Title Omitted:)

This Day this cause came on to be heard upon the Motion of Defendant requiring the Plaintiff to file its Bill of Particulars, the filing of which had heretofore been ordered by this Court on the 11th day of March, 1955, and the Court after hearing the arguments of counsel and upon being fully advised in the premises, it is hereby

Ordered and Adjudged that the Plaintiff file the Bill of Particulars as heretofore ordered within four (4) weeks from the date of this order.

Done and Ordered at Miami, Dade County, Florida, this 10th day of November, 1955.

(Signed) EMETT C. CHOATE,
United States District Judge.

BILL OF PARTICULARS, filed December 5, 1955, in words and figures as follows:

(Title Omitted.)

The United States of America, by it undersigned. attorney, and in compliance with the order entered by this Court on the 15th day of March, 1955, files this Bill of Particulars in the above cause:

Answering Paragraph 2 of the order as follows:

(a)	Net Gain From the Sale of Capital Assets	$23,163.83
	Insurance Agency Fees	710.98
	Real Estate Commissions	45,000.00
(b)	Operating Expenses Allowed Per Return	28,714.28
	Contributions, Real Estate & Sales Taxes Allowed	814.01

JAMES L. GUILMARTIN,
(James L. Guilmartin),
United States Attorney, For the United States of America.

This is to certify that a copy of the foregoing Bill of Particulars was mailed to each of the following: Miller & Kennedy, 342 Hanna Building, Cleveland 15, Ohio; Blackwell, Walker & Gray, First Federal Building, Miami, Florida; and Arthur B. Cunningham, Esquire, 37 N. E. First Avenue, Miami 32, Florida, this 5th day of December, 1955.

PAULINE P. GOSSETT.

NOTICE OF TRIAL, setting trial for March 12, 1956, in words and figures as follows:

(Title Omitted.)

Take Notice that the above-entitled case has been set for trial at Miami, Florida, on March 12, 1956, at 9:30 A. M.

Date Dec. 22, 1955.

JULIAN A. BLAKE,
Clerk.
BLACKWELL, WALKER & GRAY,

First Federal Bldg.,
Miami, Fla.

CLAUDE PEPPER LAW OFFICES,

37 N. E. 1st Ave.,
Miami, Fla.

To: U. S. Attorney,
Miami, Fla.

Milton J. Harris,
2675 Flamingo Drive
Miami Beach, Fla.

Capitol Idemnity Ins. Co.,
P. O. Box 1349,
W. Palm Beach, Fla.

MOTION FOR CONTINUANCE and supporting affidavit filed February 28, 1956, in words and figures as follows:

(Title Omitted.)

Comes Now the Defendant, Milton J. Harris, by and through his undersigned attorneys, and respectfully moves the Court for an order to continue the trial of the above styled cause from March 12, 1956, to be reassigned for trial at a later date. In support of the foregoing Motion, the undersigned respectfully shows the Court the following:

1. That in September, 1954, a Motion for Bill of Particulars was filed.

2. That on March 11, 1955, this Court entered an order directing the Plaintiff to file a Bill of Particulars.

3. That thereafter, on October 5, 1955, the Defendant filed a motion to require the Government to file the Bill of Particulars as was heretofore ordered.

4. That on November 10, 1955, an order was entered by this Court requiring the Government to file its Bill of Particulars within four weeks; that at the hearing on the motion filed on October 5, 1955, it was explained to the Court that since this case was an income tax case it involved certain accounting procedures, and that the Defendant could not go forward in preparation for the defense of this cause until the Bill of Particulars was filed.

5. That on December 5, 1955, the Government filed its Bill of Particulars.

6. That on December 9, 1955, at a showing of the Criminal Docket, the within cause was set down for trial for Monday, March 12, 1956.

7. That the Defendant has encountered certain difficulties in connection with the employment of properly qualified accountants, all of which is set forth in the attached Affidavit; that because of these difficulties with the employment of properly qualified accountants, the Defendant will be unable to properly prepare for the trial of this cause, now set on March 12, 1956.

It is therefore respectfully requested in view of the foregoing, and in view of the statements set forth in the attached Affidavit of the Defendant's attorney, Arthur B. Cunningham, that this cause be continued from March 12, 1956, to be reassigned for trial during the month of April, 1956.

CLAUDE PEPPER LAW
OFFICES,
Attorneys for Defendant.

37 N. E. First Avenue,
Miami 32, Florida.

By ARTHUR B. CUNNINGHAM,
(Arthur B. Cunningham).

It Is Hereby Certified that a true and correct copy of the above and foregoing Motion for Continuance, be mailed to the Honorable James L. Guilmartin, United States Attorney, Post Office Building, Miami, Florida, this 28th day of Feb., 1956.

ARTHUR B. CUNNINGHAM.

(Title Omitted.)

Affidavit.

State of Florida,
County of Dade, ss:

Before Me, the undersigned authority, duly authorized to take and administer oaths, personally appeared Arthur B. Cunningham, 37 N. E. First Avenue, Miami 32, Florida, and after first being duly sworn, deposes and says:

1. That he is one of the attorneys of record employed by the Defendant in the above styled cause.

2. That he was present in Court on November 10, 1955, at which time this Court entered its order requiring the Government to file its Bill of Particulars within four weeks.

3. On this same day, November 10, 1955, the Affiant contacted Allen Tomlinson, one of the partners of the accounting firm of Pentland, Purvis, Keller & Company, Miami, Florida, with a view to employing said firm to handle the accounting necessary in the above styled cause; that at the time, a conference was arranged to be held between Defendant's counsel and the members of the firm of Pentland, Purvis, Keller & Company, on November 21, 1955; that on November 18, 1955, the Affiant contacted the firm of Pentland, Purvis, Keller & Company to make final arrangements relative to the holding of the conference scheduled for November 21, 1955; that due to certain conflicts in the schedules of the representatives of Pentland, Purvis, Keller & Company, this conference was re-scheduled for December 8, 1955; that on December 8, 1955, a conference was held at the offices of Blackwell,

Walker & Gray with Robert Asti of that firm, present on behalf of the Defendant, and William Wright and Allen Tomlinson of the firm of Pentland, Purvis, Keller & Company, and the Affiant.

4. That at the conference held on December 8, 1955, a full discussion was had of the problems involved in this cause, at which time it was determined to hold a further conference on December 28, 1955, with C. Leo De Orsey, Esq.; that C. Leo De Orsey was employed by the Defendant to handle the civil tax problems of this Defendant, and certain accounting procedures had been completed by him, but were not available to the Defendant, or the counsel in this cause, or the accountants, William Wright and Allen Tomlinson, until December 28, 1955, at which time C. Leo De Orsey would be in Miami, Florida; that it was believed that it would save time and a duplication of effort if the prior accounting procedures of C. Leo De Orsey were made available.

5. That arrangements could not be made to hold a conference with C. Leo De Orsey until January 11, 1956.

6. That on January 11, 1956, a conference was held at Claude Pepper Law Offices, with the following persons present: C. Leo De Orsey, William Wright, Allen Tomlinson, the Defendant, Milton J. Harris, and his counsel Robert Asti, and the undersigned; that at this conference, the accounting problems and procedures were discussed and arranged for, and that the books, papers, records and documents would be called for and obtained by the aforementioned accountants on January 13, 1956.

7. That none of the representatives of the firm of Pentland, Purvis, Keller & Company called for the records on

January 13, 1956; that the Affiant, on January 17, 1956, telephonically communicated with said accountants, relative to the obtaining of these books and records; that thereafter, on January 20, 1956, the Affiant discussed the matter of obtaining these books and records with Hugh Purvis, senior partner of said accounting firm, and the Affiant was advised that Mr. Purvis would call it to Mr. Wright's attention immediately.

8. That thereafter, a conference was scheduled to be held on February 3, 1956.

9. That on February 3, 1956, the conference was held with the following persons present: William Wright, Allen Tomlinson and Hugh Purvis of the accounting firm of Pentland, Purvis, Keller & Company, Defendant's counsel, Robert Asti, and the Affiant.

10. That it was not until this conference held on February 3, 1956, did the accountants indicate that there was a possibility that they would not do the accounting work necessary herein; that this was a policy decision to be made by their firm, and that the Affiant would be advised of their decision within a few days.

11. That by letter dated February 6, 1956, a copy of which is hereto attached, the Affiant was advised that said accounting firm would not handle the necessary accounting work in this case.

12. That on the following day, February 7, 1956, the Affiant conferred with Clem Sammons, C.P.A., Miami, Florida, with a view to employing him to handle the necessary work in this cause; that at said conference, Clem Sammons advised the Affiant that he would give consid-

eration to accepting the employment if he had sufficient time in which to do the necessary work, but that he had been subpoenaed to testify in a certain case at Los Angeles, California, and would be absent from Miami from February 10, 1956, to February 17, 1956, and could do nothing thereon until February 20, 1956.

13. That on February 21, 1956, the Affiant conferred with Clem Sammons, reviewed the file, considered the accounting problems involved, and the Affiant submitted the books, records, papers and documents to Mr. Sammons to prepare the necessary accounting work in this cause; that at this conference, the Affiant was advised by Mr. Sammons that he could not fully or completely do all of the accounting procedures until on or before April 12, 1956; that he could partially complete the accounting procedures in the event this cause is not continued, further stating that by not having sufficient time to complete the required accounting procedures, certain vital accounting matters affecting the substantial rights of this Defendant would be necessarily omitted.

Further your Affiant sayeth not.

ARTHUR B. CUNNINGHAM,
(Arthur B. Cunningham).

Sworn to and Subscribed before me, this 28 day of Feb., 1956, at Miami, Dade County, Florida.

JOAN V. RUDISILL,
Notary Public, State of Florida
at Large.

(Seal)

ORDER DENYING MOTION FOR CONTINUANCE, entered February 29, 1956, in words and figures as follows:

(Title Omitted.)

This Cause coming on to be heard upon Defendant's Motion for Continuance, and the Court, after having examined the Affidavits attached thereto, and after having been fully advised by the parties hereto, it is therefore,

Ordered and Adjudged that the Defendant's Motion for Continuance be hereby denied.

Done and Ordered in Chambers, at Miami, Dade County, Florida, this 29 day of Feb., 1956.

(S.) EMETT C. CHOATE,
United States District Judge.

SUBPOENA DUCES TECUM dated March 14, 1956, served on defendant upon application of Government, in words and figures as follows:

(Title Omitted.)

You are hereby commanded to appear in the United States District Court for the Southern District of Florida at Rm 234 Fed. Bldg., 300 NE 1st Ave., in the city of Miami, Florida on the 26th day of March, 1956, at Nine o'clock A. M. to testify ~~in~~ the case of United States v. Milton J. Harris, and bring with you records as per attached list:

1. All records pertaining to business activity of The M. J. Harris Company, for the years 1944, 1945 and 1946, including but not limited to the following:

a. Income summaries for the years 1944, 1945 and 1946.

b. Multi-column expense journals for the years 1944, 1945 and 1946.

c. Canceled checks, check stubs and bank statements for the years 1944, 1945 and 1946.

d. Purchase invoices and receipts for the years 1944, 1945 and 1946.

e. Stock record book and minute book of The M. J. Harris Company.

This Subpoena is issued upon application of the [1] United States March 14, 1956.

JAMES L. GUILMARTIN,
Attorney for the United States,
Miami, Florida.

JULIAN A. BLAKE,
Clerk.
By PATRICIA L. GOBEIL,
Deputy Clerk.

Return.

Received this subpoena at .....
on ..... and on ..... at .....

---

[1] Insert "United States," or "defendant" as the case may be.

served it on the within named..... by delivering a copy to h.... and tendering to h.... the fee for one day's attendance and the mileage allowed by law.

.....

By .....

Dated: ....., 19....

Service Fees

Travel .....$.....

Services ....

.....

Total .....$.....

MOTION TO QUASH SUBPOENA DUCES TECUM filed March 22, 1956, in words and figures as follows:

(Title Omitted.)

Comes Now the Defendant, Milton J. Harris, by and through his undersigned attorneys, and moves the Court to quash the Subpoena Duces Tecum served upon the defendant by the Government directing him, as a duly authorized representative of the Milton J. Harris Company, to appear and produce certain books, papers and documents described in said subpoena, on the grounds that the compliance therewith would be unreasonable and oppressive and that the material and matters sought thereby are self-incriminatory and irrelevant and further that the subpoena from its very terms, wherein all records pertaining to the business activity of the Milton J. Harris Company for the years 1944, 1945 and 1946 are sought,

is all encompassing and is but a fishing expedition on the part of and by the Government.

BLACKWELL, WALKER & GRAY,
Attorneys for Defendant.

First Federal Building,
Miami, Florida.

CLAUDE PEPPER LAW OFFICES,
Attorneys for Defendant.

87 N. E. First Avenue,
Miami 32, Florida.

By ARTHUR B. CUNNINGHAM,
(Arthur B. Cunningham).

It Is Hereby Certified that a true and correct copy of the above and foregoing Motion to Quiet Subpoena, was personally delivered to the Honorable James L. Guilmartin, United States Attorney, Post Office Building, Miami, Florida, this 22nd day of March, 1956.

ARTHUR B. CUNNINGHAM.

ORDER DENYING MOTION TO QUASH SUBPOENA DUCES TECUM entered March 23, 1956, in words and figures as follows:

(Title Omitted.)

This cause coming on to be heard upon the Motion of Milton J. Harris, the defendant herein for an Order to Quash Subpoena duces tecum served upon him by the Government, and the Court after hearing the arguments of counsel for both sides and being fully advised in the

premises, and finding that the furnishing of the items enumerated in Paragraphs a, b, c, d, and e, of the subpoena, is not un- is not unreasonable of oppressive, and the Court further finding that the said M. J. Harris Company is an entity separate and distinct from the defendant, and that therefore the furnishing of the documents subpoenaed would not be self incriminatory to the defendant, ECC since defendants counsel asserts that the said M. J. Harris Company is a separate entity, it is therefore, .

Ordered And Adjudged that the Defendant's Motion to Quash be denied except that Milton J. Harris, as a duly authorized representative of the M. J. Harris Company be required to deliver over to the Government only those items set forth in Paragraphs a, b, c, d, and e, of the subpoena.

Done And Ordered in Chambers, at Miami, Dade County, Florida, this 23rd day of March, 1956.

EMETT C. CHOATE,
United States District Judge.

The entire STENOGRAPHIC TRANSCRIPT of the minutes of the trial prepared by the Court Reporter, filed June 20, 1956, in words and figures as follows:

(Title Omitted.)

Miami, Florida.

The above entitled cause came regularly on for trial before the Hon. Emett C. Choate, United States District Judge, and a jury duly and regularly impaneled and sworn to try the same, in open Court in Miami, Florida, on

March 28, 1956, and subsequent dates, commencing at 3:45 p.m. o'clock.

Appearances:

Mr. David Rosen, U. S. Assistant District Attorney, appearing on behalf of the Plaintiff.

Mr. Arthur B. Cunningham, of the law firm of Claude Pepper Law Offices; Mr. Philip T. Weinstein, of the law firm of Claude Pepper Law Offices; Mr. Robert Asti, of the law firm of Blackwell, Walker & Gray; appearing on behalf of the Defendant.

(March 28, 1956—Impaneling of the jury.)

March 29, 1956—a. m. Session.

The Court:

You may proceed, Mr. Rosen.

(Opening statement by counsel for the Government.)

The Court:

Your turn, Mr. Cunningham.

Mr. Cunningham:

I would rather reserve my opening statement until after the close of the Government's case.

The Court:

Granted.

Mr. Rosen:

Now, counsel for the defendant has agreed to Government's Exhibit 1, and I understand he has no objection to its going into evidence.

Mr. Cunningham:
No objection.

Mr. Rosen:
This is a 1946 personal income tax return filed by the defendant; and Government Exhibit 2 is a corporation return filed by M. J. Harris Co. in Cleveland—a photostatic copy.

The Court:
It correctly depicts the return filed?

Mr. Rosen:
Yes, sir.

Mr. Cunningham:
Actually it is a final return, if the Court please, as of August 16, 1946, which is when the company was dissolved.

The Court:
In other words, it covers the calendar year for that corporation until the time it ceased to do business.

Mr. Cunningham:
That's right, and we have no objection.

The Court:
Let them both be admitted.

(The documents referred to were thereupon marked Government Exhibit 1 and Government's Exhibit 2, respectively.)

Thereupon—H. D. CARR, JR. was called as a witness by the Government, and having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Rosen:

Q. State your name, please?

A. H. D. Carr, Jr.

Q. By whom are you employed?

A. Lawyers' Title Insurance Company.

Q. In what capacity?

A. Branch manager, Miami office.

Q. Pursuant to a subpoena duces tecum did you bring with you escrow files No. 1508 and #1590.

A. I did.

Q. Will you first open and examine escrow file No. 1508?

A. Yes, sir.

Q. Do you have in that file a document dated and noted as follows, "Receipt for commission—October 21, 1946."?

A. I do.

Q. May I have it, please?

A. (Said document handed to counsel.)

Q. And a seller's closing statement dated October 16, 1946; and a letter from Milton J. Harris dated September 24, 1946; and a letter from R. O. Fisher Corp. to Lawyers Title, dated July 18, 1946?

A. That last is not addressed to Lawyers Title—it is addressed to J. W. Ware and M. J. Harris.

Q. May I have those?

(Said documents handed to counsel.)

Mr. Rosen:

I would like to have those marked for identification in inverse order. Please mark this letter of July 18, 1946 as Government Exhibit for Identification 3; the September 24, 1946 letter as Government Exhibit for Identification 4; and the seller's closing statement as Exhibit for Identification 5. Mark the "receipt for commission" as Government Exhibit for Identification 6.

(So marked.)

Q. In your escrow file #1590 do you have a closing statement dated October 15, 1946?

A. I do.

Q. And do you have a letter from Milton J. Harris to Lawyers Title dated October 18, 1946?

A. I do.

Mr. Rosen:

Will the Clerk mark the closing statement as Exhibit 7 for Identification, and the letter as Exhibit 8 for Identification?

(So marked.)

Q. Referring to Exhibit 3 and through and including Exhibit 6, will you tell us what your escrow file #1508 deals with?

A. File #1508 deals with the transaction involving the Flamingo Hotel—the sale of the Flamingo Hotel and the closing of the mortgage loan thereon.

Q. And those papers just identified, are they the portions of that file kept in the regular course of your business?

A. They are.

Q. And escrow file #1590, tell us please what that deals with?

A. That file deals with the purchase of a residence by Mr. Milton J. Harris and wife.

Q. And the documents you have identified, which have been marked Exhibits 7 and 8 for Identification, were those papers kept in the regular course of business as a portion of your file there?

A. They were.

The Court:
Do you want to offer those in evidence?

Mr. Rosen:
Yes, sir.

Mr. Cunningham:
Mr. Carr, I believe you testified this Exhibit 3 for Identification was a part of your escrow file #1508?

The Witness:
Yes, sir.

Mr. Cunningham:
This is a copy of a letter?

The Witness:
That's right.

Mr. Cunningham:
If the Court please, the questions I have asked is a matter of cross examination rather than identification of the documents. I have no objection to Exhibits 3, 4, 5 and 6.

The Court:
They will be admitted.

(So marked.)

Jurist:
There was something mentioned about the Flamingo Hotel. It wasn't brougt out if Mr. Harris was the broker.

The Court:
You have to be patient in hearing these cases. It takes a little while sometimes to develop all the facts.

Mr. Cunningham:
If the Court please, I might aid and assist in that. I might state....

Mr. Rosen:
Just a minute.

The Court:
Better not. To put you on the witness stand would be better.

Mr. Cunningham:
I could make it very quick.

The Court:
If you want to argue the point I have no objection, but don't testify.

Mr. Cunningham:
I have reference to a stipulation, and in connection with it I want to object to the introduction of documents #7 and #8.

The Court:
What are the grounds of your objection?

Mr. Cunningham:
In that respect I would have to make this statement respecting a stipulation all in the same breath.

Mr. Rosen:
Do you want the jury removed.

Mr. Cunningham:
I don't care if they go or stay here.

The Court:
The Jury will be excused.

(Thereupon the jury retired from the Courtroom and the following proceedings were had:)

Mr. Cunningham:
If the Court please, we did stipulate in this matter that Mr. Harris acting as the M. J. Harris Company did receive a commission of $45,000 as his share of the brokers fees —a fellow named Ware participated also. The commission was paid by the Fisher Corporation, which is a Lindsey-Hopkins corporation, on the sale of the Flamingo Hotel, and the sale was made through the efforts and negotiations principally by Mr. Harris on behalf of his firm, and his associate, Mr. Bilily Ware of the Ware Realty Corporation here.

As to these documents #7 and #8 I don't think they are admissible because the matter of the application of the funds is of no import as I see it.

The Court:

There is no contention about these being Mr. Harris's letters or correspondence?

Mr. Cunningham:

No question about that. That is his signature.

The Court:

I can't guess in advance whether they have any connection with Mr. Harris's transactions or not. It is a case that requires proof of income, and it may be that outgo or income may be mixed up in some of these. If, for instance, we found that this commission was credited on the purchase of his property it would indicate income.

Mr. Cunningham:

We are ready and willing to admit that there was a brokerage commission paid of $45,000, and I don't think it has any probative value as to what he did with those funds. I think it may only be prejudicial to him and may inflame the jury against him to a degree.

The Court:

The brokerage was paid to the company, and this evidence indicates it was paid to him, or at least that he used it.

Mr. Cunningham:

The application of the funds is of no importance.

The Court:

It might be of extreme importance. One might say money was paid to you, but if it turns up I used it it would indicate it was paid to me.

Mr. Cunningham:

In the bill of particulars the Government say they are going to prove real estate commissions of $45,000—capital gains of $23,000—and partnership income in the amount of $710, and that is all that is necessary to be proved....

The Court:

I think this has some relevance. This tends to show that Mr. Harris individually used the commission on that Flamingo Hotel deal.

Mr. Cunningham:

If the Court please, he reported the $45,000 in his corporate return.

The Court:

However, he may have reported it in the wrong return.

Mr. Cunningham:

Are they going to charge people with crimes for mistakes in how they may have reported their income?

The Court:

Sometimes it is a mistake and sometimes it isn't. I agree that he should not be charged for mistakes, but at this early stage how can you tell whether it is a mistake or what it is.

I think these are admissible. They are not clinching proof of the matter but they are a straw in the wind, so to speak.

Mr. Cunningham:

We are willing to admit that there was a brokerage commission paid by the Fisher firm in the amount of $45,000; but the application of the funds will do nothing but prejudice this man in the eyes of the jury.

The Court:

I am going to let them in. Evidently, either the corporation got the money or he got it. They are attempting to show that he had it, in any event, and that is part of the proof that he got it.

Mr. Cunningham:

If the Court please, I would like to reserve the right to move on that later.

The Court:

I agree, and you can move to strike all this stuff if the evidence indicates it is not pertinent.

Exhibits 7 and 8 will be admitted, it being stated that they contain the signatures of the defendant.

Call back the jury.

(Thereupon, the jury returned to the Courtroom and the following proceedings were had.)

The Court:

Exhibits 7 and 8 for Identification will be admitted in evidence, and so marked.

(So marked.)

Mr. Rosen:

I would like to read the exhibits to the jury.

Mr. Cunningham:

If the Court please, I want my objection to follow through on those matters.

The Court:

Yes, on Exhibits 7 and 8 it will follow through.

Mr. Rosen:

Government Exhibit 3 is a carbon copy of a letter from the law offices of Hunt & Salley, dated July 18, 1946, directed to Mr. J. W. Ware and Mr. Milton J. Harris, Real Estate Brokers, Miami Beach, Florida. It reads as follows:

"Gentlemen:

As, if and when the sale of the property commonly known as the Flamingo Hotel property of Miami Beach, Florida, is completed with Gordon Macklin, or his company, associates, or his nominee, we agree to pay the following sums, for your real estate fees:

To J. W. Ware, of Miami Beach, the sum of $25,000.00.

To Milton J. Harris of Ohio and Florida, the sum of $50,000.00.

The aforementioned payments when made to you shall be in full payment of your commissions for said transaction, and you will agree to this by signing copy of this letter for our files.

We herewith authorize the escrow agent, Lawyer's Title Company, Shoreland Building, Miami, Florida, which is handling the consummation of said deal, to make the said payments to you from funds to our credit in said escrow, upon completion of the said deal in escrow.

Very truly yours,"

This is signed by Carl G. Fisher Corporation, by F. R Humpage, President, and by F. M. Fincher, Secretary.

It is then counter-signed as follows:

"The foregoing arrangement for payment and the amounts therein stated are herewith approved by the undersigned."

Signed by Milton J. Harris and J. W. Ware.

Exhibit 4 is a letter dated September 24, 1946, to Lawyers Title Insurance Corporation, 122 Shoreland Arcade, Miami, Florida, and signed by Milton J. Harris. It reads as follows:

"Gentlemen:

If and when you are ready to pay me the sum of $50,000.00 in accordance with authorization given you by the Carl G. Fisher Corporation, as shown in their letter of July 18, 1946, I hereby direct you to disburse said sum as follows:

To: J. W. Ware the sum of $5,000.00 and to your Escrow File #1590, in which I am purchasing the house at 2675 Flamingo Drive, Miami Beach, Florida, the sum of $45,000.00.

Very truly yours,"

That is signed by Mr. Milton J. Harris.

Government Exhibit 5 is a sellers closing statement dealing with Lawyers Title Insurance Corporation's escrow file #1508, and dated October 16, 1946. This closing statement reflects brokers' commission to J. W. Ware—$30,000, and to Milton J. Harris—$45,000.

Government Exhibit 6 is a carbon copy of a receipt for commission, and it says:

"Received of Carl G. Fisher Corporation the total sum of Seventy-Five Thousand Dollars ($75,000.00) in full payment of real estate brokers' commission due and owing on account of the sale of the Flamingo Hotel property by Carl G. Fisher Corporation to Flamingo Hotel Company.

J. W. Ware hereby acknowledges receipt of $30,000.00 of said commission and Milton J. Harris hereby acknowledges receipt of $45,000.00 of said commission.

Dated this 21st day of October, 1946."

This is signed by J. W. Ware and Milton J. Harris.

Government's Exhibit 7 is a purchasers closing statement, dated October 15, 1946, dealing with escrow file #1590 wherein Milton J. Harris and his wife purchased.

.....

Mr. Cunningham:

If the Court please, I object to counsel paraphrasing the contents of the statement.

The Court:

Sustained. Just read what is on there.

Mr. Rosen:

"Purchasers Closing Statement. Sale—Carrie R. Sapiro and Samuel T. Sapiro to Milton J. Harris and Ernestine Barbara Harris. Property—Lot 3, Block 2, Flamingo Terrace Sub.

Credits:

Deposit with seller —	$10,000.00
Deposit in escrow —	7,000.00
Commission Flamingo Hotel sale	— $45,000.00."

I just wanted to read that part.

The Court:

You can read anything on the page, but don't describe what is on there.

Mr. Rosen:

Government's Exhibit 8 is a letter from Milton J. Harris to Lawyers Title Insurance Corporation, dated October 18, 1946. It reads as follows:

"Gentlemen: I hand you herewith my check in the sum of $5,000 drawn on the Miami Beach First National Bank. I am placing these funds with you to assure you against loss on account of the approximate sum of $5,000 still due and owing to your Escrow Account in the Flamingo Hotel transaction from the purchasers on account of new insurance which has been purchased.

You are to hold this check as security against loss until $5,000 has been placed with you by said purchasers of said Flamingo Hotel, at which time you are to pay me the said $5,000 together with the sum of $102.32 which is the balance due me in connection with Escrow No. 1590.

You will not deliver to Mr. J. W. Ware any commission in connection with the Flamingo Hotel deal until the aforesaid insurance monies have been received from the Flamingo Hotel purchasers.

Very truly yours."

This is signed by Milton J. Harris.

The Court:
Is that all?

Mr. Rosen:
Your witness, Mr. Cunningham.

Cross Examination.

By Mr. Cunningham:

Q. Mr. Carr, I hand you Government's Exhibit 3, but before we go into that, what position did you say you hold with Lawyers Title Insurance Corporation?

A. Branch manager of the Miami office.

Q. How long have you been there?

A. I have been in Miami since 1947.

Q. Then you were not present when this transaction took place relative to the sale of the Flamingo Hotel?

A. No.

Q. Do you know anything personally about this transaction?

A. No, I do not.

Q. Referring to Government's Exhibit 3, you know nothing about the preparation of that letter or how it happened to be in the file, do you?

A. I do not.

Q. I hand you an exhibit admitted as Government's Exhibit 4 and I will ask you if you know whether or not that letter was prepared in your office?

A. I don't know.

Q. Do you know if you have stationery of this type?

A. No, I do not. I couldn't identify it.

Q. There was "Re: Escrow No. 1590" marked across the top there?

A. That is correct.

Q. And that has been stricken out by pencil?

A. That's right.

Q. When was that stricken?

A. I don't know.

Q. Was it stricken recently?

A. Not to my knowledge.

Q. I talked to you in your office a few weeks ago?

A. That is correct.

Q. Do you recall if that was stricken at that time?

A. Yes, it was.

Q. Who would have knowledge of the numbers of Lawyers Title aside from the people of that corporation—anybody?

A. Yes, anyone connected with that transaction would have correspondence from us with that number on it. That is our file number and any letter we write regarding that transaction would bear that number for our records.

Q. You have no knowledge of why that was stricken out?

A. No.

Q. Do you know who the Carl G. Fisher Corporation is?

A. Not of my personal knowledge, no.

Q. Do you know if Lindsey-Hopkins has anything to do with this corporation?

A. Not of my personal knowledge.

Q. Do you have any knowledge of it?

A. I can check the file and see if the name appears.

Mr. Rosen:

Just a moment. I object to this line of questioning. It is beyond the scope of direct; and secondly, it is completely immaterial to the issues in this case.

The Court:

That is probably true, but he can answer it if he can.

A. The only names that seem to appear in our file with reference to the Carl G. Fisher Corporation are those of Mr. Humpage and Mr. Fincher.

Q. Does your file reveal the name of the seller of the Flamingo Hotel?

A. Yes, the Carl G. Fisher Corporation.

Q. I also want to know the name of the buyer of the Flamingo Hotel. Can you tell me the name of the buyer?

A. Flamingo Hotel Company.

Q. Do you have the purchase agreement, Mr. Carr—either purchase agreement or deposit receipt? Do you have a letter there from Hunt & Salley dated July 19, 1946?

A. I have one dated July 18th. I handed you a copy of the sales contract.

Q. Is an executed copy of the sales agreement attached to that letter in your file?

A. No, it is not.

Q. Do you know why the sales agreement is not there?

A. No, I do not.

Q. Would you say the sales agreement is not in the file?

A. No, not yet. . . I would have to look a little longer.

Q. Let me add one more question. . . .

A. I do not find a copy of the deposit receipt or sales agreement in the file.

Q. That letter you had reference to of July 18th said the agreement was accompanying the letter, did it not?

A. That's right.

Q. Is there any explanation in the file why the agreement is not there?

A. I can go back and read all the correspondence.

Q. No. I direct your attention to Government's Exhibit 5 which indicates that the property was sold to the Flamingo Hotel Company.

A. That's right.

Q. How do you know it was sold to the Flamingo Hotel Company? What is the basis of that?

A. Simultaneously with the closing of that sale we closed a mortgage loan in which the Flamingo Hotel Company mortgaged the property.

Q. What is the basis of your information that the Carl G. Fisher Corporation sold to the Flamingo Hotel Company?

A. An examination of the public records would show the deed.

Q. What is in your records to show it?

Mr. Rosen:

He just answered that by showing that the corporation mortgaged the property.

The Court:

I think he has answered it about as far as he can. He says there is nothing in there other than letters.

Q. I direct your attention to a letter in there as of October 1, 1946 from Gordon Macklin . . . scratch the question.

Does your file reveal that the Gordon Macklin corporation was the purchaser of the Flamingo Hotel?

A. There is a letter dated July 18th to Lawyers Title describing that agreement which says it was between Carl G. Fisher Corporation as the first party and Gordon Macklin & Co. as the second party.

Q. And the closing agreement indicates that the Flamingo Hotel Corporation is the party of the second part; is that right?

A: That is right.

Q. Now, will you find that letter of October 1, 1946 from Gordon Macklin? Also watch for a letter of October 19th from the Flamingo Hotel—will you watch for that?

A. I have found the letter of October 1st.

Mr. Cunningham:

I would like to have that marked for Identification, if the Court please.

(Marked as Defendant's Exhibit 1 for Identification.)

Q. Has that file ever been out of your possession?

A. Not that I know of.

Q. Certain things were removed from the file recently, were they not?

A. These exhibits were removed from the file.

Q. When were they removed from the file?

A. This morning.

Q. Now, how about the letter of October 19, 1946 from the Flamingo?

A. Yes, I have it.

Mr. Cunningham:

I would like to have that marked for identification.

(Marked as Defendant's Exhibit 2 for Identification.)

Q. This small card is part of your file, is it not?

A. That is correct.

Mr. Cunningham:

I would like to have this card marked for identification.

(Marked as Defendant's Exhibit 3 for Identification.)

Mr. Cunningham:
I have no further questions.

The Court:
Do you have any further examination, Mr. Rosen?

Mr. Rosen:
No, sir.

(Witness excused.)

The Court:
Call your next witness.

Thereupon—ROBERT W. GARDNER was called as a witness by the Government, and having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Rosen:
Q. Please state your name?
A. Robert W. Gardner.
Q. Where are you employed?
A. At the Reidar-Marshall Insurance Agency.
Q. In the year 1947 whom were you employed by?
A. United States Treasury Department, Intelligence Unit, Miami, Florida.

Mr. Rosen:
I would like this instrument marked as Government's Exhibit 9 for Identification.

The Court:
Let it be marked.

(So marked.)

Q. I hand you Government's Exhibit 9 for Identification, and ask you to examine the last page and tell me if you recognize the signature appearing there?

A. Yes. I do.

Q. Is that your signature?

A. Yes, it it.

Q. What is the purpose of your signature appearing on that document?

Mr. Cunningham:
Object until I have an opportunity to see the document.

The Court:
Come forward and look at it.

(Said document examined by Mr. Cunningham.)

The Court:
You may go ahead.

A. I witnessed the signature of Mr. Harris.

Q. Where and when did that take place?

A. That was January 26, 1948, in Room 1717, DuPont Building, Miami.

Q. And were you at that time employed as a special agent of the Intelligence Unit, United States Treasury Department?

A. I was until about the first of April, 1948.

Q. You didn't propound those questions.

Mr. Cunningham:
Object. Nothing here has been admitted into evidence.

Mr. Rosen:
I will withdraw the question.

Q. Was each page of this document initialed in your presence by the signer?
A. Yes, it was.

Mr. Rosen:
I will now offer it in evidence as Exhibit 9 for the Government.

Mr. Cunningham:
If the Court please, I would like to be heard on this matter.

The Court:
Very well. We will excuse the jury.

(Thereupon the jury retired from the Courtroom, and the following proceedings were had:)

Mr. Cunningham:
If the Court please, this is a question and answer statement obtained from the defendant on December 18, 1947. It is an original of the typed statement, and all this witness knows about it is that he signed it. He was not present at the time the statement was made—at least it doesn't indicate he was present—and all he knows is that Mr. Harris signed it. There are probably witnesses here who were present.

Mr. Rosen:

That was the time he signed it.

Mr. Cunningham:

It was signed in January of 1948, and the date of the taking of the statement itself is December 18, 1947 As the Court well knows, in a criminal case you can't take a deposition, and the Government has not got the right to do that —only in very unusual circumstances is a criminal case can you take a deposition, and what they are trying to do here now is indirectly do something that the rules do not provide for—the matter of taking deposition. It is not admissible for someone to testify as to its contents. If there are admissions against interest then the persons present at the taking could testify to them.

The Court:

Is there anyone here who was present at the taking?

Mr. Rosen:

This is the only man who asknowledged his signature after it was reduced to writing, and I call to the Court's attention that there were a number of admissions made by the defendant and initialed by him.

The Court:

Just let him describe what Mr. Harris did. Whether he read it and made the corrections and so forth.

Mr. Cunningham:

I want to voice my strong objection to the reading of this document. It is violative of our very rules in connection with the taking of depositions. The matters in this document are hearsay, and the only way they could be admissible would be by a person present who heard

the statements made; and that person testifying to them. He can refresh his recollection if he wants to, but for him to read everything in that document would be highly improper and prejudicial.

Another thing; those are loaded questions. They are the most loaded questions you ever saw; and they don't give him much of a chance to answer. They are leading in nature, and many times are double questions, and the very nature of the questions are objectionable.

The Court:

I think it is admissible if it touches on the issues in this case.

Mr. Cunningham:

There are only a few questions in the document relative to 1946, and I think it should be limited only to those items.

The Court:

I will instruct them to disregard any matters not involved in this issue.

Mr. Cunningham:

I think they should be stricken or covered before this is made available to the jury for examination.

The Court:

Let me see it.

(Said document handed to the Court.)

Mr. Cunningham:

May I ask something before you rule, Your Honor. My further objections to admitting this in evidence are to

matters contained therein with reference to other years or matters not identified as to time; and that it is not admissible because it is immaterial and irrelevant and has no bearing in this case, particularly in view of the fact that in this case we were supplied by a bill of particulars that said the government would attempt to prove certain things, and to go beyond the scope of that bill I think is in error on the part of the Government. None of these things have any reference to the year 1946 and have no bearing.

The Court:

If he didn't report his taxes prior to 1946 it has some bearing on his wilfullness.

Mr. Cunningham:

But they have to show there was a tax due before they can get these admissions in. They are highly prejudicial.

The Court:

When was the Shelborne deal.

Mr. Cunningham:

Anything that is not in 1946 is not admissible, and if it is in 1946 it is beyond the bill of particulars.

The Court:

I think I will let it go in, and I will instruct the jury not to pay any attention to anything other than the year 1946 which is involved here, except on the question of intent. These things may bear on the question of intent.

Mr. Cunningham:

Are you going to permit the government to read from the start to the end of it to the jury. If they are not to

regard parts of it I think they should be blocked out, and things to be properly considered presented to the jury.

The Court:

I don't think we can. It is too vague, in my opinion, to block out.

Mr. Cunningham:

If it is vague that is another reason for them not having it.

The Court:

I don't think it makes so much difference. There are a lot of statements in here that would apparently help him.

Mr. Cunningham:

But, Your Honor, there is nothing there that as I see it, bears on the year 1946 with the exception of the Shelborne matter and the last page with respect to the Flamingo Hotel matter. Frankly, I have never known of such a statement as this being admitted en toto into evidence. If this were a deposition we would stop on every question to see if it were properly asked, and then object to the question if not properly stated. If they were in position to take a deposition they couldn't do these things. It is tantamount to calling on him to testify here.

The Court:

No, it is quite different. They can't call on him to testify, but if he testified without being called on it makes a difference. This indicates he is a man of education and they told him of his constitutional rights, and he proceeded to make certain statements that he thought might help him.

It is true that it covers certain years outside of this indictment, but it is likewise true, in part at least, that he hadn't been paying taxes for quite a spell of time, and that goes to intent.

Mr. Cunningham:
That is my point; until they can show he owed taxes for those prior years these accusations should not be there.

The Court:
He says here he owed them in many instances.

Mr. Cunningham:
Sometimes I think I owe taxes and, then I check and find I do not.

The Court:
He says he didn't even file any tax returns prior to that.

Mr. Cunningham:
That is correct. Now, until they can show he was required to file a return that is immaterial and should not be before the jury.

The Court:
Anybody with a certain number of dollars has to file.

Mr. Cunningham:
But they have to show by some proof that they had those dollars.

The Court:
He says here he had them.

Mr. Cunningham:

Those admissions were relating only to corporate income —not as to his personal income. This corporation was operated at a loss for years, and this agent here knew what he was talking about. It would be highly prejudicial and should not be placed before this jury.

The Court:

I am not going to invade the province of the jury.

Mr. Cunningham:

If it goes to the jury then the harm is done, as the Court well knows, and until they can lay the proper foundation and show that returns should have been filed then the fact they were not filed should not be before the jury. He operated as a corporation and his corporate returns showed he operated at a loss and he didn't have any taxable income. If they are in a position to show that he operated at a profit:

The Court:

In the year 1941 he mentions a salary of $1400. He didn't file a return that year.

Mr. Cunningham:

In 1941 you didn't have to file for $1400. These statements here might create a suspicion, but mere suspicion does not come within the rule as to prior acts.

I am reminded that in 1945 he lived in Puerto Rico and filed Puerto Rico returns—he didn't even live here.

Mr. Rosen:

Are you testifying?

Mr. Cunningham:

Those facts should be before the Court so that the Court can rule on this.

Mr. Rosen:

May I point something out; typed on his 1946 personal return is the following note: "I was resident of Puerto Rico for the entire year but maintained offices in Cleveland and Miami Beach at great expense with no income. Established in business there for 25 years so kept up offices though absent."

This is on his personal return—not his corporate return.

Mr. Cunningham:

That's right, he made that statement—he had no income.

The Court:

I will leave it in. It might bear at the proper time.

Mr. Cunningham:

With this witness?

The Court:

He has to go ahead with this witness. I don't know if this witness knows anything about it or not.

Call the Jury back in.

(Thereupon the jury returned to the Courtroom and the following proceedings were had:)

(By Mr. Rosen):

Q. Mr. Gardner, can you recall in whose office this statement was signed?

A. I am sorry, I cannot.

Q. Was it your office?

A. No; it was either in an attorney's office or an accountant's office—I am not sure which.

Q. Whose attorney, or whose accountant, if you know?

A. As far as I know, he was representing Mr. Harris.

Q. You will notice certain initials at the bottom of each page and certain corrections and interlineations of certain portions. Will you tell me, if you know, who made those, and under what circumstances?

A. From my recollection of this, Mr. Harris read the statement over in front of me and at certain points that he came to. . . .

Mr. Cunningham:

If the Court please, I object to all this line of questioning of what the record shows.

The Court:

The objection will be considered as contingent. Overruled.

A. (continued) Mr. Harris read this over in my presence, and as he went through it he made certain objections to some of the statements and corrections were made. I made the corrections and had Mr. Harris initial each correction, and also sign each page as he read it.

Q. And did he sign it in your presence on the last page?

A. Yes.

Q. And you signed as witness to that?

A. That's right.

Mr. Rosen:

I re-offer the exhibit.

Mr. Cunningham:

I renew my objections.

The Court:

Overruled. I will admit it.

Now, ladies and gentlemen of the jury, this is what is termed a statement made by the defendant in respect to numerous transactions, situations and conditions, and it is being admitted here only as it bears on some of the issues in this case; that is, as respect to income that was received by the defendant, or perhaps by his corporation, during the year in question, 1946.

There is a lot of other stuff in this particular statement which does not pertain to the income received during the challenged year. You will not consider that as proof of guilt or innocence of this defendant except as it may, in your opinion, bear upon intent or wilfullness—we will later describe that to you.

What happened in other years has nothing to do with the year in question, except there may possibly be some evidence of wilfullness or intent on the part of the defendant.

Keep that in mind when you review this particular exhibit.

(Said document marked as Government Exhibit 9.)

Mr. Rosen:

Your witness.

Mr. Cunningham:

I have no questions.

(Witness excused.)

Mr. Rosen:

Before going ahead with the next witness I want to introduce in evidence as Exhibit 10 a certified copy of

the warranty deed which consummates the escrow account. I wish to show that the purchase was eventually consummated. It is certified by the Clerk of the Circuit Court before Judge Floyd.

Mr. Cunningham:

Object. If it is admissible at all it speaks for itself and it is not necessary for counsel to explain it. I further object on the same basis I objected before; that the matter of application of funds has no bearing in this matter at all.

The Court:

I will overrule it. I think the fact the man received funds and used them might be evidence.

Mr. Cunningham:

If it is not all properly connected up.

The Court:

Then you can move to strike it at any time, Mr. Cunningham.

(Said instrument marked as Government Exhibit 10.)

Thereupon—MORRIS NISENSON was called as a witness by the Government, and having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Rosen:

Q. Please state your name?

A. Morris A. Nisenson.

Q. Where do you reside?

A. 2815 Euclid Heights Boulevard, Cleveland Heights, Ohio.

Q. Are you here in response to a subpoena?

A. That's right.

Q. What is your profession?

A. I am a certified public accountant.

Q. In the year 1947, and prior, by whom were you employed?

A. I was in the Internal Revenue Office in Cleveland, Ohio.

Q. How long were you with that service?

A. From October of 1945 until September of 1951.

Q. In June of 1946. . . .

Mr. Cunningham:

Object to the very leading nature of the question.

The Court:

Let him finish the question.

Q. In June of 1946 did you see a person named Milton J. Harris?

A. I did.

Q. Do you see him here now in this Courtroom?

A. Yes, he is the gentleman at the end of that center table to my right.

Mr. Rosen:

Let the record reflect that the witness identified the defendant.

Q. At that time in 1946 did you have any conversation with the defendant?

A. Yes. I did.

Q. Where did that conversation take place?

A. In his office in the Swetland Building in Cleveland.

Q. Was anyone else present at that time?

A. Not that I recall, unless his secretary was there.

Q. What was the purpose of your visit?

A. I was there to examine his '53 tax return.

Q. 1953?

A. Excuse me. . . the 1943 tax return of the M. J. Harris Company.

Q. At that time did you have any conversation with the defendant relating to personal income taxes?

A. Yes. I did.

Q. Will you state to the Court and the jury what you said to the defendant and what he said to you?

A. When I came into his office and met Mr. Harris I noticed there were two large degrees or diplomas hung over his desk.

Mr. Cunningham:

Object. That has nothing to do with it.

The Court:

Sustained.

Q. State what was said.

A. I had asked Mr. Harris for his personal income tax returns in order that I might examine them in conjunction with the M. J. Harris Company returns.

Mr. Cunningham:

Object to any further testimony in this respect unless he can lay a proper foundation why he was there.

The Court:

He was a government agent examining tax returns. You see those fellows once in a while.

Mr. Cunningham:
They have a definite assignment to be there.

The Court:
It doesn't make any difference. They also have a definite duty to inquire into all these matters.

Mr. Rosen:
I will establish that.

Mr. Cunningham:
I know just exactly the methods they use.

The Court:
I dare say you went out of your specific assignment many times Mr. Cunningham.

Mr. Cunningham:
I like things to be done in an orderly process, and I think they should be.

The Court:
I know you do, and I wish we could have everything done in an orderly process, but unfortunately human beings are disorderly in their processes, and their actions must be to some degree.

Q. Will you state the reasons why you inquired into his personal returns?

A. I had been assigned the 1943 return of the M. J. Harris Company for examination. I got that assignment in March, 1946, and I called his office for an appointment. Mr. Harris was not in town at the time and I left word for him to call me when he returned. In June of 1946 I received a call that Mr. Harris was in town and would

like to see me. At that time I went in and commenced the examination of that 1943 return.

Q. Why did you inquire into his personal returns?

Mr. Cunningham:
Object:

Mr. Rosen:
You asked for the basis of it.

The Court:
I think that is quite right.

Mr. Cunningham:
I will withdraw my objection.

A. I inquired about the 1943 return.

Mr. Cunningham:
I have another ground for my objection—it is a prior year.

The Court:
I have instructed the jury about prior years and I will emphasize it again. Just try to remember that what happened in prior years to 1946 is not proof of anything that happend in that year, except that there may be proof of a course of conduct or intent or wilfullness if the evidence develops some indication of that sort of thing. Otherwise, you will not regard it.

Q. Will you state the reason why you inquired into his personal returns?

A. It seemed to me that Mr. Harris might be conducting a law practice in addition to his real estate busi-

ness, and that some of the expenses on the 1943 return of the M. J. Harris Company might be duplicated on his personal return or vice versa.

Mr. Cunnigham:
Object, and ask all that be stricken. It is not responsive.

The Court:
I think it is responsive.

Mr. Cunningham:
His reasons for asking should not be considered as evidence.

The Court:
This jury is intelligent enough to know that what he had in his mind is not evidence against Mr. Harris. All Internal Revenue agents are born suspicious minded, but that is not evidence.

Mr. Cunningham:
I am glad you brought that out.

Q. Continue with your conversation with Mr. Harris.
A. I asked Mr. Harris to supply me with retained copies of his personal income tax return so that I could compare them with the corporate returns and determine if there was a possibility of duplication, and he told me he had not filed any personal income taxes or returns since the early thirties.
I asked him why not, and he said

Mr. Cunningham:
My objection to continue on the same basis.

The Court:

It is continued as to all this conversation on the same basis. The same ruling.

A. (continued) He stated that his returns had been examined some time in the early thirties by an examiner whose name he couldn't recall, and who he could not identify in any way, and that he had been told inasmuch as he was operating his business through a corporation and he was the sole owner of the corporation that it would not be necessary for him to file personal income tax returns inasmuch as the corporation also paid all his personal expenses, and so he discontinued filing Form 1040, the individual tax return.

Q. Did you have any further discussion concerning furnishing tax returns?

A. Yes, I told him that whoever had told him that had obivously misinformed him, and that even though he operated as a corporation that corporation was separate and distinct from himself as an individual; that it was required of him that he file personal income tax returns, and anything the corporation disbursed for his benefit, or to him, or for him, was income to him personally and should be reported by him on an individual income tax return.

Mr. Rosen:

I would like these expense sheets (eight pages) marked as Government Exhibit 11 for Identification.

(So marked.)

The Court:

I think this would be a good point to recess for lunch. We will adjourn until two o'clock.

(Lunch recess—12:15 to 2:00 p.m.)

P.M. Session.
March 29, 1956.

The Court:

Is there something you want to bring up before the Jury comes back in?

Mr. Cunningham:

I hope I don't speak too frequently in this matter but I think it is a serious thing—in connection with that statement (Government Exhibit 9) I do want to call the Court's attention to two cases in connection with the admissibility of that statement—

(Discussion off the record.)

The Court:

I will go over it with you and pick out what is not relevant and then instruct the jury, or maybe we can cross it out. I have certainly no idea of letting irrelevant evidence in here, although here it seems to be about fifty-fifty on each side. I would like to keep it out but I can't cut a statement in two without some agreement.

Mr. Cunningham:

We would be glad to take the time to go over the questions one by one.

The Court:

All right, but right now let's bring the Jury in.

(Thereupon the jury returned to the Courtroom, and the following proceedings were had:)

The Court:

Do each of you waive polling of the jury, and concede they are present?

Mr. Cunningham:

Yes, sir.

Mr. Rosen:

Yes, sir.

The Court:

You may proceed.

(Direct examination of the witness, Mr. Morris Nisenson, was continued.)

(By Mr. Rosen):

Q. Mr. Nisenson, I hand you these eight pages which have been marked as Government Exhibit 11 for Identification, and ask you to look over these pages for a few minutes.

(Witness complied.)

Q. Do you recognize those documents?

A. Yes.

Q. To the best of your recollection, where did you receive those?

A. These were obtained from Mr. Irving Zwick, who was a certified public accountant engaged by Mr. Harris, or Mr. Harris' attorney, and who worked with us in obtaining whatever data we requested with respect to items we had not already seen.

Q. And these were delivered to you by Mr. Zwick?

A. That's right.

Q. Did Mr. Zwick have power of attorney for Mr. Harris?

A. Yes, he did.

Q. Do you recall ever having the originals of these?

A. That I can't say.

Q. These photostats are what Mr. Zwich brought in to you?

A. Yes, these are what we worked with.

Mr. Rosen:

Offer them as Government Exhibit 11.

Mr. Cunningham:

Mr. Nisenson, you say these photostats were given to you by Mr. Zwick?

The Witness:

That's right.

Mr. Cunningham:

Or were the originals given to you by Mr. Zwick?

The Witness:

Frankly, I don't ever recall seeing the originals.

Mr. Cunningham:

That is ten years ago, isn't it—1946?

The Witness:

No, not in this instance. Mr. Zwick came into the case sometime late in 1947.

Mr. Cunningham:

Have you had these papers in your possession since you received them?

The Witness:
During the course of the examination, yes, up until I turned in the case.

Mr. Cunningham:
When did you leave the government?

The Witness:
February, 1951.

Mr. Cunningham:
And did you say that you were not handed original copies of these papers?

The Witness:
If I was I don't recall it.

Mr. Cunningham:
You don't remember?

The Witness:
No.

Mr. Cunningham:
You don't know if you were given originals or photostats?

The Witness:
No, I don't.

Mr. Cunningham:
You say these papers were prepared by Mr. Zwick?

The Witness:
No, I said they were obtained from Mr. Zwick.

Mr. Cunningham:
You don't know anything about the preparation of the papers?

The Witness:
No, sir.

Mr. Cunningham:
You don't know who prepared them?

The Witness:
No.

Mr. Cunningham:
But Mr. Zwick turned them over to you?

The Witness:
Yes, myself and a special agent who was working with me.

Mr. Cunningham:
Mr. Sarrey?.

The Witness:
That's right.

Mr. Cunningham:
If it please the Court, I want to object to the introduction of these documents. In the bill of particulars the government has set forth certain allowable expenses in respect to the calendar year, 1946. It reads: "Operating Expenses Allowed Per Return—$28,714.28." There has been no question about the matter of expenses. The only question before this Court, as I understand it, is the matter of the commission, and I don't see how this has any bear-

ing on the issues in this case. We had no knowledge they were going to bring in anything like this in view of the statement by the government that operating expenses would not be questioned.

The Court:

They will no doubt bring in a lot of stuff of which you have no knowledge.

Mr. Cunningham:

It is the purpose of the bill of particulars to inform us of what the issues are, and they did so do. Now they bring in something else.

The Court:

What is the object of these papers?

Mr. Rosen:

Solely and specifically for the purpose of showing intent.

Mr. Cunningham:

I have one other ground, too. On the matter of competency and who prepared them.

The Court:

Mr. Rosen, how would these assist you in arriving at possible intent?

Mr. Rosen:

The government purposes to show that certain items were duplicated on the personal return and the corporate return.

Mr. Cunningham:

I will object to that statement now at this time, and if the Court please. . . .I don't want to interfere but things

may be said in the presence of the jury that are not admissible in this case.

The Court:

Let me see that a minute.

(Instrument examined by the Court.)

The Court:

You said he was attorney for Mr. Harris. I presume you meant he was attorney in fact to represent him in dealing with the government in income tax matters?

The Witness:

That's right; he was one of the persons who had power of attorney at that time.

Mr. Cunningham:

The basic information would have to be in evidence before the summaries are admissible. I might mention also that the returns of the corporation have not been questioned and are not before this Court.

The Court:

If expenses were duplicated it would be very pertinent evidence.

Mr. Cunningham:

They have admitted the operating expenses.

The Court:

They didn't admit them in duplicate. On his statement that he is going to establish a duplication I will admit these, subject to motion to strike. Let them be admitted but only for the purpose of showing possible intent.

Mr. Cunningham:

I want to object because I claim surprise because of the admissions in the bill of particulars.

The Court:

I didn't grant the bill of particulars in order to keep the government from showing the necessary intent and wilfullness beyond a reasonable doubt.

Mr. Cunningham:

If the Court please, the purpose of the bill of particulars is to inform me so that I can properly prepare a defense of the case.

The Court:

The purpose of the bill is in the discretion of the Court, and its purpose is not to inform you beyond what the Court thinks is necessary for you to have to meet the case. I can deny the bill en toto if I see fit. I told them to tell you what items they had with respect to commissions and income, and to state whether or not they challenged the expenses in the personal return. However, I did not state that they could not show duplication, if any, of these same expenses.

Mr. Cunningham:

If they come in here and tell me they are not going to question the operating expenses how can I be prepared to meet that?

The Court:

It is not a question of operating expenses. It is a question of intent.

Mr. Cunningham:

It comes within the same matter.

The Court:

I understand that you are contending that the income of the corporation is not in controversy here, but it is evident that the corporation and the individual couldn't have the same identical expenses.

Mr. Cunningham:

It is our contention that the real estate commission involved here was reported in the corporate return, and properly reported as such, and when they submitted this bill of particulars I thought the question of expenses would go no further. If the income goes to the corporation then the expenses logically go to the corporation, and if the income goes to the individual then the admitted expenses logically go to the personal income. I don't think any further evidence concerning that is germane or material or relevant here.

The Court:

I am sorry I can't agree with you. I am admitting this as Government Exhibit 11, subject to motion to strike if it is not connected up.

(So marked.)

Mr. Cunningham:

I want to add the further objection that a proper foundation has not been laid.

The Court:

Overrule that, because the evidence that the attorney in fact delivered it to him went in without any objection—nobody objected to that.

Mr. Cunningham:
Didn't I object?

The Court:
No, sir, you did not.

Mr. Cunningham:
I would like to object now and ask that it be stricken.

The Court:
I will deny that.

Mr. Rosen:
May I have this instrument marked as Government Exhibit 12 for Identification?

(So marked.)

(By Mr. Rosen):

Q. I hand you Government Exhibit 12 for Identification and ask you to please examine it. Do you recognize that book?

A. Yes, sir.

Q. Where and when did you first see that?

A. I first saw it in June of 1946 when it was given to me by Mr. Harris himself. It is his check register, or you might call it his expense register, in which he recorded his disbursements for the M. J. Harris Company, and from which he took the expenses for his income tax return.

Q. How many years does that cover?

A. 1943 through 1946.

Mr. Rosen:
Offer this as Government Exhibit 12.

Mr. Cunningham:

Do you know the handwriting on the sticker on the face of this? I am sure you don't. . . . it is my handwriting. I have no objection, Your Honor.

The Court:

Let it be admitted.

(Said instrument marked Government Exhibit 12.)

Mr. Cunningham:

Although admitted without objection Your Honor, that refers to years other than the year under contention.

The Court:

I have already instructed the jury about years other than the one in contention, and unless it bears on intent and wilfullness they will ignore those years.

Mr. Cunningham:

We have another ground relative to our motion to quash the subpoena. If they are used in any way with respect to the individual we, of course, feel they are objectionable on that basis. If they are here for the purpose of the corporation then all right.

The Court:

The individual has nothing to say about corporate records, even though he may be the sole stockholder. The corporation has a separate identity and that is always subject to subpoena.

Mr. Cunningham:

The only purpose is their application with respect to the corporation.

The Court:

There might be a greater application. They might disclose a transaction between the corporation and the individual.

Mr. Cunningham:

If so, I want to object on the ground of self-incrimination, and that the production here by subpoena was forced on us.

The Court:

I am going to overrule that because the corporation is a separate identity, and even though the individual may be the sole officer and sole stockholder they are still the corporation records.

Mr. Cunningham:

It depends for what purpose the government wants to use them.

The Court:

The purpose can be unlimited in my concept of the law.

(By Mr. Rosen):

Q. Mr. Nisenson, during the course of your investigation did you run into the names of F. W. Kessler, Irwin Heiman, Fatoullah Company, Ferryman Company, Harmon Investment Company and Sanabria Company?

A. Yes.

Q. What efforts did you make to ascertain who these individuals or companies were?

Mr. Cunningham:

I am going to object, Your Honor, unless there is some way he is going to connect it up. I don't know these

names—I don't know if they have any relation to the issues involved.

The Court:

I think some of them are in that statement.

A. Those are names of auctioneers or dealers in postage stamps—philatelic dealers. . . .there were many expenditures. . . .

Mr. Cunningham:

Object and ask that the answer not be considered. I don't know what is involved here, and he is going beyond the scope of the question.

Mr. Rosen:

I will join you in that. Don't go into that much detail.

Q. You did ascertain that these were stamp collectors or dealers in rare stamps?

A. That's right.

Q. Do you know who H. Barber is?

A. Yes, that is Hazel Barber—Mr. Harris' mother-in-law.

Mr. Rosen:

Your witness.

Cross Examination.

By Mr. Cunningham:

Q. Mr. Nisenson, I believe you said you were assigned the 1943 returns of the M. J. Harris Company; is that right?

A. That's right.

Q. And were you an Internal Revenue agent at that time?

A. That's right.

Q. When were you assigned to those returns?

A. Right after March 15th of 1946.

Q. 1946?

A. That's right.

Q. And which returns were assigned to you—for what years?

A. Just the one year—the 1943 return.

Q. I believe you said the M. J. Harris Company was located in the Swetland Building?

A. Yes.

Q. Did you go to the office of the M. J. Harris Company?

A. Not right away. I called for an appointment and was told he was away in Puerto Rico.

Q. Was the M. J. Harris Company listed in the telephone book?

A. Yes.

Q. And you did go to that place of business later?

A. Yes, later I did. I was out of town working a case in Canton when I received notice from my office in Cleveland that Mr. Harris had returned and had called the office for an appointment with me.

Q. And did you thereafter make an appointment with him?

A. Yes, I called him when I returned to Cleveland.

Q. Was that the first time he was back in the United States from Puerto Rico from the time of your first call?

A. As far as I know, yes.

Q. And that was a couple of months after you were first assigned to the case?

A. Yes, I was told he would return in June.

Q. And where did you meet with him?

A. At his office in the Swetland Building.

Q. The office of the M. J. Harris Company?

A. That was the name on the door.

Q. And you announced then that your purpose was to examine the 1943 income tax return of that company?

A. That's right.

Q. You met with Mr. Harris in the office?

A. That's right.

Q. Is that the time you had the conversation about the personal returns for prior years?

A. That's right.

Q. And your testimony is that he said he had been advised by an Internal Revenue agent personally that he didn't have to file a personal return, and you told him he should file a personal return?

A. That's right.

Q. And this was before the 1946 return was filed; is that right?

A. That's right; that return wouldn't be filed until 1947.

Q. Did you examine the record of the M. J. Harris Company for 1943?

A. Yes, I did.

Mr. Cunningham:

Mark this, please.

(Instrument marked Defendant's Exhibit 4 for Identification.)

Q. I hand you what has been marked for identification as Defendant's Exhibit 4, and ask you if that book was made available to you at the time of that examination?

A. That is the minute book—yes, I have seen it.

Q. It is the articles. State generally what it is without explaining the contents.

A. This is the minute book of the M. J. Harris Company containing the articles of incorporation, and the minutes.

Q. When you met with Mr. Harris was anyone else present? I don't recall what you said about that.

A. His secretary had a desk in the lobby of the office and she was present part of the day I am pretty sure, but I can't definitely recall that.

Q. Did he cooperate fully with you in connection with your investigation?

A. Well, I asked him to make available to me all the data he had; all bank account books, records, canceled checks, and so forth, in connection with the company and/or himself, and he stated this was what he had—this book, the canceled checks of the M. J. Harris Company, the check stubs of the account maintained in the Cleveland Trust Co. and that was the whole thing.

Q. Did you make all those things available to you?

A. He made those things available to me, yes.

Q. Did he make any arrangements with you whereby you could go in there and look at anything you wanted to, and look at his files, even in his absence?

A. Yes, he did permit me to do so.

Q. He put no limits on you? You could do anything and look at anything he had?

A. No, not with respect to the files, but he had a closet on which shelves the records were kept, and I was permitted to go in and take those as I worked along with them.

Q. And you were permitted to go in there by yourself and work there in his absence?

A. He would go out of town on occasion and I was permitted to go in and sit at a desk and work there, yes.

Q. He didn't keep anything from you? He gave you everything you wanted to work with?

A. I asked for certain things that were not made available to me. He denied they existed but I subsequently found them.

Q. Will you state what they were?

A. There were bank accounts in other banks other than the Cleveland Trust Company, which was the only one designated—he gave me all the M. J. Harris Company material with respect to that one bank account.

Q. In the Cleveland Trust Company?

A. Yes.

Q. That was the principal account, was it not?

A. Yes, that was the principal account. He said, however that there was nothing else but that, and I subsequently found out that there was.

Q. Isn't it true that Mr. Harris gave you everything there and turned all the books over to you and made everything available to you, and cooperated with you one hundred percent in every way?

A. I can't say that definitely.

Q. It is just about true, isn't it?

A. He gave me everything with respect to the Cleveland Trust Company account, this minute book and the ledger, and nothing more.

Q. When did you become a certified public accountant?

A. August 18, 1950 I received my certificate in the state of Ohio.

Q. When did you complete your investigation with respect to the 1943 return?

A. I can't give you any definite date because we picked up the '44 and '45 returns, and subsequently the 1946 return, and went back and picked up the prior years as well.

Q. Isn't it true that Mr. Harris himself asked you to examine the 1946 return?

A. No, sir.

Q. Do you recall having a conversation with him in which he stated to you that he was working out of Puerto Rico and wanted his 1946 return examined, and you said you did not have authority to do that and would have to get authority from Washington before you could examine the 1946 return?

A. I made no such statement.

Q. Isn't it true that if you are authorized to examine, for example, the returns for the calendar years 1943, '44 and '45, that before you can proceed to examine the 1946 return you must get official authorization; isn't that true?

A. I would merely have to requisition the 1946 return when we were ready to work on it.

Q. You would have to seek the authority if it hadn't been assigned to you to work on, would you not?

A. That's right, I would have to requisition the return.

Q. Did you investigate the individual income tax return of this taxpayer for the year 1946?

A. No, that return was filed down here. I don't recall that I had a great deal to do with the individual return other than to make a computation of the tax based on what I had learned.

Q. Did you ever examine the 1946 individual income tax return? Do you know who was assigned the investigation of the 1946 individual return?

A. At the time Mr. Sarrey and I worked together, and I don't recall whether we received the original up there or whether we worked from a retained copy. I know our report did include a 1946 return.

Q. A 1946 individual return?

A. Yes.

Q. And your report contained that?

A. That's right.

Q. So you did have to make some inquiries with respect to the individual income tax return for 1946?

A. That's right.

Q. I am handing you what has been admitted in evidence as Government Exhibit 1, which is the individual income tax return of Mr. Harris for the calendar year 1946, and I want to direct your attention to the Capital Gains Schedule. The first item there is the Markway Company liquidation; is that true?

A. That's right.

Q. And the amount set forth is $7711.83?

A. That is correct.

Q. Did you make any investigation to determine the accuracy of that amount?

A. I recall we did make some investigation in connection with that.

Q. Isn't it your purpose to arrive at the true net income of an individual when you make an investigation?

A. That's right.

Q. You say you made "some investigation" as to the Markway Company liquidation. Will you tell me what investigation was made as to the accuracy of that amount?

A. We examined the Markway return, and I also examined the return of an office associate of Mr. Harris.

Q. Mr. Feigenbaum?

A. That's right.

Q. You know him, do you not?

A. Yes, I do; and as I recall it came up with a deficiency on his return in connection with this, but I can't be sure as to the amounts.

Q. You make records as you make an investigation?

A. Certainly, but I don't have those papers.

Q. Can you give us any information as to what the extent of your investigation was as to the correctness of this Markway liquidation?

A. I am sure there was a deficiency, and since both Mr. Harris and Mr. Feigenbaum were participants both returns were adjusted.

Q. Do you have any papers showing that, Mr. Nisenson?

A. The Markway case was turned into the office and closed a long time ago.

Q. Do you know whether or not the $7711.83 capital gain reported was a short time or long term capital gain?

A. It seems to me it was a long term capital gain.

Q. Was the long term capital gain $7711.83, or was it $14,000?

A. That I don't recall?

Q. All you recall is that it was a long term capital gain?

A. I know the property was held for more than six months.

Q. And if it was a long term capital gain, and the total capital gain was $7711.83, then it is over-reported in this return; isn't that correct?

A. Yes, if the entire gain was that. . . . but I don't know.

Q. You don't know?

A. I don't know if this figure represents the whole of the gain or one-half.

Q. But if this does represent the whole?

A. Then it would be over-reported.

Q. I direct your attention to the next item on the 1946 income tax return—the Harmon Company. Did you make any investigation to determine the correctness or incorrectness of that?

A. I believe we did.

Q. Do you have your working papers or anything in connection with that?

A. I do not.

Q. Do you know whether or not an income tax return was filed by Harmon Company with respect to the calendar year 1946?

A. That I don't recall.

Q. Mr. Nisenson, you are a certified public accountant. If the Harmon Company during 1946 had certain profits in connection with the sale of its property those profits would be received by the Harmon Company; isn't that right?

Mr. Rosen:

That's a matter for the Court. I don't see the relevancy.

The Court:

I will sustain the objection. It is probably not material. I think we need to get hold of his report, if he has one.

Mr. Cunningham:

This would go to intent.

Mr. Rosen:

This is not the return in question.

The Court:

He says he does not have the report.

Mr. Cunningham:

He says he is a C.P.A., and I am asking him for an opinion. I want to determine if he investigated the Harmon Company.

The Court:

You can ask him that.

Q. Did you investigate the Harmon Company?

A. We investigated some records with respect to them.

Q. Isn't it true that Harmon & Company was in existence all during the calendar year of 1946?

A. I know a transaction was made disposing of the property that was designated as the Harmon Company in 1946, and Mr. Harris reported the gain. As I recall, on the Harmon Company transaction there wasn't anything that we would contest. It worked out to be properly reported, as I recall.

Q. If the Harmon Company was an organized and existing corporation and it sold certain of its property during 1946 that sale would be reportable by the Harmon Company and not by Mr. Harris as an individual; isn't that true?

Mr. Rosen:
Object, as to materiality.

The Court:
Sustained. It is immaterial.

Mr. Cunningham:
May I be heard on that?

(Thereupon the jury retired from the Courtroom and the following proceedings were had:)

Mr. Cunningham:
On this individual return there is reported a capital gain by Mr. Harris with respect to the Harmon Company. As a matter of fact, the Harmon Company was a duly organized and existing corporation that owned property in the calendar year, 1946, and that property was sold and the property was reported by the Harmon Company in its return as being sold. Now, the inclusion of this amount as income to Mr. Harris—it should not have been included in his return. It is taxable to the Harmon Company, and he included it in his own return; and I say that goes to intent also.

The Court:

Apparently this is a matter of liquidation.

Mr. Cunningham:

If the Court please, the property was sold.

The Court:

It is a liquidation according to this.

Mr. Cunningham:

He innocently reported it when it should not have been included.

The Court:

You can go into that later. You will have to make him your witness if you want to go into that and show those things. The witness said he investigated that item and found if accurate.

Mr. Cunningham:

Then I want to cross examine him further.

The Court:

All right.

Mr. Rosen:

It is going far beyond the scope of direct.

The Court:

You can inquire if you want to, but what you ought to have is the investigator's report. I don't see how he can tell if the man reports that he liquidated his half interest unless he knows. You insist it is there in error. To me it is very clear it is a liquidation return. I can't imagine a man who has gone to college and who is an

educated man saying that he received for his half interest so many dollars and then not know whether he got the dollars. It seems to me if he got these dollars other than in liquidation then it doesn't belong in that column—it belongs in a much higher tax column. Wherever he got it—he got it.

Mr. Cunningham:

That depends on what disposition was made.

The Court:

If he got it in his bank account he has to report it. He can't come back and say he made a mistake and he wants to give it back to the corporation. Either he received it in liquidation, or as ordinary income from the corporation—it is one way or the other.

Mr. Cunningham:

If the property is sold by the corporation then the money belongs to the corporation.

The Court:

That is not the point. He says there that he got the money.

Mr. Cunningham:

If this is corporate income then it it taxable against the corporation, and it should not have been included in his return. If he reported it here it was over-reported.

The Court:

It is not a matter for cross examination unless this witness knows exactly what this defendant did with all this money. If he doesn't know that he couldn't testify to it—he would be guessing.

Mr. Cunningham:

He is supposed to have made the investigation of the case, and I suppose we are here by reason of his report.

The Court:

Suppose you ask him whether the defendant got the money or not. If he knows then he can testify to it, but I am not concerned with the witness's opinion or his guesses, or his legal opinions.

Mr. Cunningham:

If it can be shown. . . .

The Court:

If it can be shown I will so instruct.

Mr. Cunningham:

If it can be shown that this was returnable by the corporation, and this man reported it when he should not have reported it and over-reported his capital gains would it not go to his intent?

The Court:

That is a matter of law. If you bring in any evidence I will certainly so instruct, but I am not going to permit this witness to enter into the realm of conjecture, or even into the realm of law.

(Thereupon the jury returned to the Courtroom and the following proceedings were had:).

The Court:

Do you each waive polling of the jury and concede they are present?

Mr. Rosen:
Yes, sir.

Mr. Cunningham:
Yes, sir.

The Court:
Go ahead.

Mr. Cunningham:
Will you mark this as Defendant's Exhibit 5 for Identication?

(So marked).

Q. Mr. Nisenson, I hand you Defendant's Exhibit 5 for Identification, and ask you to state, if you know, what they are?

A. Yes, I remember them. I haven't seen them in a long time, but this is the old capital-stock tax.

Q. Those are capital-stock tax returns?

A. Yes.

Q. Are those part of the records that were made available to you at the time of the examination of the M. J. Harris Company?

A. I don't recall ever seeing these particular ones.

Q. Are they part of the records of the M. J. Harris Co.?

A. These.

Mr. Rosen:
Just a minute. I object—he is asking for a conclusion of the witness. He stated he had never seen them before.

The Court:
Sustained.

Q. You can't say whether you saw them or not?

A. I don't recall ever seeing them.

Q. With respect to the Harmon Company, do you know whether or not the Harmon Company filed an income tax return for the calendar year 1946?

A. No, I don't know.

Q. Did you check the records in the District Director's office to determine whether or not a return was filed by the Harmon Company for the calendar year 1946?

A. I don't recall that I did.

Mr. Cunningham:

Please mark this for identification.

(Instrument marked as Defendant's Exhibit 6 for Identification.)

Q. I hand you defendant's Exhibit 6 for Identification, and ask you if you recall ever having seen that during the course of your investigation of the M. J. Harris Company?

A. No, I don't recall that I have.

Q. In your investigation of the individual income tax return of Mr. Harris for the calendar year 1946, wouldn't it be necessary for you to know whether or not a return was filed by the Harmon Investment Company, one of the items mentioned in his income tax return?

Mr. Rosen:

Object as calling for a conclusion.

The Court:

He can ask if it would be necessary, if he knows.

A. I don't think in our examination at the time, or our conclusions at the time, that we considered that return.

We knew of the transaction and knew Mr. Harris received the proceeds of the transaction, and took it on the basis of the transaction itself.

Q. Isn't it your purpose when you make an audit and an examination to arrive at the true net income of the individual for that year?

A. As closely as we can, yes.

Q. And if he reported something that should not have been reported you would make the necessary adjustments; isn't that true?

A. That's right; if we know that an adjustment is necessary we should pick it up.

Q. If he over-reported you would give him a credit?

A. Yes, he is entitled to that.

Q. And in order to make those adjustments isn't it necessary to check the various items set forth in his return?

A. Yes.

Q. You say you did find out something about the sale of certain property of the Harmon Investment Company for the calendar year 1946?

A. That's right.

Mr. Cunningham:

Mark this.

(Instrument marked Defendant's Exhibit 7 for Ident.)

Q. And did you find out in your investigation that was a real estate transaction of the Harmon Investment Company?

A. You mean the sale of the Harmon property—yes, we knew that was a real estate transaction.

Q. Now, I hand you Defendant's Exhibit 7 for identication and ask you if you examined that in connection

with the sale of the Harmon Investment Company property?

A. I don't know whether I ever saw this or not. I may have seen a copy of it.

Q. Will you state generally what they are without revealing their contents?

A. This is an escrow statement showing.

Mr. Rosen:

Don't go any further.

A. (contd) . . . in account with the Land Title Guarantee and Trust Company.

Q. And it refers to Harmon Investment Company, does it not?

A. That's right.

Q. Did you examine, or not examine, the escrow statement to determine whether or not this was a property sale of the Harmon Investment Company or a property sale of Milton J. Harris?

Mr. Rosen:

If Your Honor please, this entire line of questioning is far beyond the scope of direct.

The Court:

That's right. Sustained.

Q. Directing your attention to the 1946 income tax return of Mr. Harris, in connection with your investigation of this individual income tax return did you come in contact with the partnership of Milton J. Harris and Gabriel Feigenbaum and their partnership return for 1946?

A. There was a partnership return, but I don't recall exactly in connection with what transaction.

Mr. Cunningham:

Please mark this for identification.

(Instrument marked Defendant's Exhibit 8 for Ident.)

Q. I hand you Defendant's Exhibit 8 for Identification and ask you if you know what that is?

Mr. Rosen:

I would like to object to the wording of the question. I think the proper question would be whether he recognizes the document.

The Court:

I will overrule that.. I think he can testify if he knows what it is, but not to testify as to the contents. If he knows what it purports to be would be the proper question.

A. It purports to be a partnership return of Milton J. Harris and Gabriel Feigenbaum in connection with the collection of rentals on real estate, and disbursements.

Q. In respect to your investigation for the calendar year 1946, did you examine the original of the Harris-Feigenbaum partnership return?

A. I don't recall if we had the original or not. We may have worked from a retained copy of that.

Q. Do you recognize that as a retained copy that you worked from?

A. It is a carbon copy. We could have worked from any one of several.

Q. Does that appear to be similar to the one you worked from?

A. I couldn't identify it exactly, but it may have been.

Q. You did then, in connection with your audit of the 1946 individual return, consider the partnership return

that had been filed by Harris and Feigenbaum; is that right?

A. I believe so.

Q. In your consideration of the return filed by Harris and Feigenbaum did you give any credit for a capital loss?

A. I don't recall.

Q. Examine that copy you have before you and see if it will refresh your recollection?

A. No, I can't say. You mean give him credit for a capital loss on his own income tax return?

Q. That's right.

A. If I checked this I am pretty sure I did.

Q. Now, directing your attention to the income tax return you have there before you, will you look at the Capital Gains Schedule there and see what the total amount of the capital gains were?

Mr. Rosen:

The document speaks for itself.

The Court:

Yes, it speaks for itself as far as I am concerned.

Mr. Cunningham:

I want him to make a comparison now.

The Court:

With what?

Mr. Cunningham:

With the bill of particulars.

The Court:

You can compare it. You don't need the witness to do that. The documents speak for themselves.

Q. If, assuming that the bill of particulars says that there was a net gain from the sale of capital assets of $23,163.83 and the income tax return says that the net gain from capital assets was $23,163.83, would you say that you had made an adjustment for any capital losses with respect to the partnership return that you said you had heretofore examined during the investigation?

Mr. Rosen:

Object to the question. The bill of particulars is not in evidence.

Mr. Cunningham:

I will withdraw the question.

Mr. Rosen:

You got to say what you wanted to say anyway.

Mr. Cunningham:

My conscience is clear, Your Honor.

Q. Directing your attention to the Schedule D of the income tax return (Government Exhibit 1) it reveals a capital gains of $23,163.83. Is there any adjustment in there for any capital losses in respect to the Harris-Feigenbaum partnership?

Mr. Rosen:

Same objection.

The Court:

Ask him if he knows. He said once he didn't know.

Q. Is there any adjustment in that income tax return with respect to the partnership loss?

Mr. Rosen:

If Your Honor please.

The Court:

That is only a partnership return. It is not a partnership loss or anything of the sort.

Mr. Rosen:

And it is not in evidence.

Mr. Cunningham:

Let me back up.

Q. Do you recall, Mr. Nisenson, having examined the partnership return?

A. I am pretty sure I did. There was a partnership return filed for 1946 which entered into our examination.

Q. Do you recall whether or not there was any capital loss in that partnership return you examined?

The Court:

I think the return will speak for itself, and again we are getting beyond the scope of direct examination. Of course, if you want to make this man your witness you may do so and then you can go into these things.

Mr. Cunningham:

It would not be good judgment on my part to make him my witness.

The Court:

Then I wouldn't do it.

Mr. Cunningham:

I would like to move at this time to strike all this witness's testimony for the reason that it appears that he

hasn't made a complete investigation of this income tax return for 1946.

The Court:
Motion will be denied. I don't think there is any such appearance at this moment.

Mr. Cunningham:
No further questions.

The Court:
Any re-direct?

Mr. Rosen:
No, Your Honor.

The Court:
Call your next witness.

Mr. Rosen:
I would like to know if I can release this witness so he may return home. This is a busy time of year for certified public accountants.

Mr. Cunningham:
No, I won't release him. I may have to make him my witness.

The Court:
You better give him a subpoena then.

Mr. Cunningham:
Is it necessary that I subpoena him?

The Court:

He is an out-of-town witness, and that is my ruling if you want to keep him here over the week-end.

Mr. Cunningham:

I would like to have to the end of the day to decide.

The Court:

All right, he can stay until Court adjourns today, and if you want to make him your witness out of turn you may do so.

Thereupon—ROBERT F. MEHRLING was called as a witness by the Government, and having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Rosen:

Q. Please state your name?

A. Robert F. Mehrling.

Q. By whom, and in what capacity, are you employed?

A. I am a special agent in the Internal Revenue Service—Intelligence Division.

Q. How long have you been employed with Internal Revenue?

A. Since October of 1945.

Q. Will you give us some of your educational background?

A. I am a graduate of Ohio State University, where I majored in accounting. I have about eighteen hours of graduate credits at American University, Washington, D. C. I am a certified public accountant in the State of Ohio.

Q. I hand you Government Exhibits 11 and 12, Exhibit 11 being the Milton J. Harris 1946 expenses, and Exhibit 12 being the M. J. Harris Company expenses. I direct your attention to the year of 1946 in the corporate book, and ask you if you made an analysis and comparison of these two exhibits?

Mr. Cunningham:

I am going to object to this line of questioning on the same basis I objected heretofore. Do you want to hear my basis again?

The Court:

No, I think I understand it. You mean it deals with outside years?

Mr. Cunningham:

No, it deals with matters beyond the scope of the bill of particulars, and I contend it has no bearing on the issues in this case.

The Court:

Overrule it, reserving you the right to move to strike.

Mr. Rosen:

Will the Reporter read the question.

(Pending question, as recorded above, read by the Reporter.)

A. Yes, I have.

Q. I now hand you Government Exhibits 1 and 2, and ask you, sir, if you have compared the items shown on Exhibit 11 with the expenses shown on Exhibit 1?

A. Yes, I have.

Q. And have you also compared the figures shown on Government Exhibit 2 with the figures shown on Government Exhibit 12?

A. Yes. I have.

Q. Take the expense items shown on Exhibit 1, the tax return—how do they correlate with the expenses shown on Government Exhibit 11?

A. In Schedule C of the individual return, which is Exhibit 1, there are various captions with total amounts of expenses, and these figures coincide with the figures shown on Exhibit 11.

Q. Do the final figures coincide?

A. Yes.

Q. And how about Government Exhibits 2 and 12; do those totals come to the same figures?

A. The individual columns for the various expenses on the corporation tax return, Exhibit 2, are the totals shown for the various expense captions in the journal.

The Court:

The journal?

The Witness:

The journal of the M. J. Harris Company showing various expense captions at the top and a breakdown of the checks.

The Court:

That is a journal of expenditures?

The Witness:

That's right.

Q. I ask you to take Government Exhibits 11 and 12, and relate to the Court and jury your analysis, and show

the basis of your analysis, for the various items of expenditures.

Government Exhibit 11 is the personal expense sheet of Milton J. Harris, and Government Exhibit 12 is the corporate sheet of the M. J. Harris Company.

A. I compared the two and found out there are a number of items in Exhibit 11 which are also found in Exhibit 12.

Q. Will you relate them?

Mr. Cunningham:

In connection with my objection, I think the Court in each instance where a question of this type comes up ought to give the jury an explanation.

The Court:

That's right; the government has not questioned the amount of the deductions made by the individual, but this evidence in my opinion is admissible because it might tend to establish a motive or intent or wilfullness, if it is found there was an under-statement of income. For that purpose only it is being admitted at this time.

Q. Will you go along with your comparison?

A. As regards the item of "advertising" the individual tax return shows a total of $2894.41.

Q. That is a personal return?

A. Yes; and my analysis of the breakdown which was submitted shows that there are thirty items making up that total, and of the 30 checks making up that total 23 of them also are listed in the corporate deduction analysis, and were also deducted on the corporation return. Of that total $1970.88 was also deducted on the corporation return.

As to "entertainment" the individual return show a total of $6490.45. The analysis shows that was made up of 53 individual checks, and of those 27 were also deducted on the corporation return—a total of $3287.15 was also deducted on the corporation return.

As to "insurance" the individual return shows a total of $1020.69. The total items number 12, and of those 8 also appear on the corporation return, and of that total of $1020.69 the duplicated figures total $523.01.

As to "rent" the individual return shows a total of $7646.33, and the breakdown shows that was made up of 43 items, and of that number 22 were also claimed on the corporation return. Of that total amount $3272.87 were duplicated in the corporate return.

As to "travel" the individual return shows a deduction of $6604.77. That was made up of 24 separate items, as shown by the analysis, and of those 20 were also claimed on the corporation return, and of the total amount of $6604.77, $5901.50 of that was also claimed in the corporation return.

As to "supplies" the individual return claims expenses of $2934.60. That is composed of 54 separate items, and of those items 35 were also listed on the expense ledger of the corporation, and $2477.23 of those items was also claimed on the corporation return.

As to "telephone expense" the individual return shows $188.03, and the breakdown sheets show it was made up of five separate items, of which three were also shown on the corporation return. Of the total of $188.03, $122.52 of that was also claimed on the corporation return.

As to "auto expense" the individual return shows it as $710.00. That was made up of five items, and of those items one item in the amount of $50.00 was also claimed on the corporation return.

Of the total of $28,714.28 expenses claimed on the individual tax return, $17,605.16 was also claimed on the corporation return for the same year.

Mr. Rosen:

That's all.

Mr. Cunningham:

I have no questions. I just want to move to strike all that testimony on the grounds stated before.

The Court:

You are re-newing your original motion to strike. I am going to permit it to remain in evidence for the purpose of possibly indicating intent or wilfullness on the part of the defendant, subject, however, to your right to again move to strike if you so desire.

(Witness excused.)

Thereupon—ARTHUR E. PERRY was called as a witness by the Government, and having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Rosen:

Q. Please state your name?

A. Arthur E. Perry.

Q. By whom, and in what capacity, are your employed?

A. I am employed by the Internal Revenue Service as an agent in the Audit Division.

Q. How long have you been so employed?

A. Since March, 1951.

Q. Will you state your background and education, and your duties as an Internal Revenue agent?

A. I am a graduate of the University of Miami where I majored in accounting and graduated in 1948. I entered the Internal Revenue Service at that time in the Collection Division and transferred to the Audit Division in 1951. Since that time I have been engaged in examining income tax returns.

Q. In the course of your employment do you compute the amount of taxes due based on certain figures and facts?

A. Yes.

Q. I hand you Government Exhibit 1, and ask you, sir, to examine it.

The Court:

Have you heretofore examined that?

The Witness:

Yes, I have examined a copy of it.

Q. Will you look those figures over and make sure they are the same?

A. The original figure, which is the loss on the return, is the same.

Q. Assuming that an additional sum of $45,000 in income were added to this return, have you computed the amount of tax that would be due and owing for the calendar year 1946, based on the other figures and the additional $45,000?

A. Yes.

Q. And what is that tax?

A. $16,297.20.

Q. And that is based on an additional $45,000 in ordinary income?

A. Yes, sir.

Mr. Rosen:

That's all.

Cross Examination.

By Mr. Cunningham:

Q. Mr. Perry, the amount you gave was merely on the assumption that you added to the original income tax return the additional sum of income in the amount of $45,000; is that right?

A. That's right.

Q. I direct your attention to the Capital Gains items here in this return. In your calculations you naturally assumed the correctness of those items; is that right?

A. Yes, sir.

Q. You didn't make any further inquiry other than just assuming there was an additional income of $45,000?

A. That is correct.

Q. You made no adjustment for any capital losses in your calculations, did you?

A. Not unless they were on the return; no, sir.

Q. The $16,000 figure you gave us was a tax figure, is that right?

A. Yes.

Q. That was a computation of the tax?

A. That's right.

Q. It was the income tax due based on an additional $45,000?

A. That is correct.

Q. Assuming that the indictment says the income tax was $9797.89, would that figure bear any relationship to your computation of the tax, to your knowledge?

Mr. Rosen:

Object to the question. Mr. Cunningham is aware of the fact that the indictment figures may be off as long as the charges are met.

Mr. Cunningham:

I disagree with Mr. Rosen's statement. They are going beyond the amount of $9797.89.

The Court:

The crime is just as great theoretically whether it is $100 or $1,000,000; if it were a crime. Mr. Rosen is essentially correct, but it does make a difference.

Q. Did you ever examine this indictment, Mr. Perry?

A. No, sir.

Q. Did you make any computations with respect to a net income figure of $26,277.23?

A. No, sir.

Q. The indictment contains a net income figure of $26,277.23. Will you check your figures and see if that bears any similarity to your own figures?

A. No, sir.

Q. Do you know how that indictment figure was arrived at, Mr. Perry?

A. No, sir, I do not.

Q. Now, Mr. Perry, in your computation did you take into consideration the net gain from the sale of capital assets of some $23,163.83?

A. Yes, sir.

Q. And did you take into consideration the insurance agency fees of $710.98? Do you know what that is?

A. Yes, sir.

Q. You took that into consideration?

A. Yes.

Q. And in your computation did you take into consideration operating expenses in the amount of $28,714.28?

A. Yes, sir.

Q. In your computations did you take into consideration contributions, real estate and sales taxes allowed, in the amount of $814.01?

A. No, sir.

Q. And if the bill of particulars sets forth an allowance for contributions, real estate and sales taxes, you have not taken that into consideration; is that right?

A. That is correct.

Mr. Cunningham:

In view of that, Your Honor, I move that this testimony be stricken.

The Court:

I will deny it, because if it is shown that he wilfully with intent to defraud made a return seeking to avoid any substantial part of the tax he would be guilty nevertheless. If he did not, then of course he would not be.

Mr. Cunningham:

No further questions.

(Witness excused.)

Mr. Rosen:

The Government rests its case, Your Honor.

Mr. Cunningham:

If the Court please, I would like to be heard on certain legal matters.

(Thereupon the jury retired from the Courtroom and the following proceedings were had:)

Mr. Cunningham:

Can we have three or four minutes, Your Honor? I have a brief I want to submit, and it is being delivered over here now.

The Court:

Suppose you make your motion and the brief will be here while you are arguing.

Mr. Cunningham:

I would like to be heard for some length on this motion. Can we have a chance to get the brief here—it is on the way.

The Court:

I will look at the brief when it gets here. Let's make the motion and start in.

Mr. Cunningham:

If the Court please, the defendant at this time would like to move for a judgment of acquittal on several grounds:

First; that the Government has failed to introduce sufficient evidence to sustain a conviction, and has failed to prove all the essential elements to such a point that the case should not be submitted to the jury.

I would like to be heard in connection with this motion in several respects.

The Court:

All right.

Mr. Cunningham:

First of all; basically this case is one based on unreported income in the sum of $45,000. An examination of the bill of particulars will reveal that the only item of unreported income contended here by the Government is a real estate commission in the sum of $45,000. However,

Government Exhibit 2, which is in evidence here, is a corporation income tax return in which the corporation has reported this $45,000 commission—the same $45,000 commission.

Now, the gist of the offense of tax evasion is one of concealment—fraud is basically the offense of concealment. In this Court in the Pinder case I recall the Court calling attention to it as a matter of . . . maybe not in so many words. . . . but a matter of concealment; and I recall the Court's reference, although not by name, to the Spies case, and if the Court please, I would like to read what has become classic language from that case.

As the Court well knows, this case involved a lawyer and he was charged with the felony of tax evasion, and the manner of the evasion was failure to file a return. Prior to the Spies case Courts in many jurisdictions had sustained convictions on such a felony because they held that in effect failure to file was a "manner". The Section provides that, "Whoever in any manner attempts to evade his taxes shall be punished", and prior to that case they held that one of the manners was a failure to file. Now, in that particular case the Court says, "No, that is not a manner—what Congress had in mind was more than a mere failure to file", and the Court—Justice Jackson in this case—said:

"Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation. Nor would we by definition constrict the scope of the congressional provision that it may be accomplished 'in any manner.' By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from

conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or conceal."

Now, Your Honor, the real meaning of the Court's statement there . . . the real essence there is, "the likely effect of which would be to mislead or conceal."

The principal matter before this Court is the matter of the $45,000 commission that was not reported on the individual income tax return, but how could there be any concealment if that $45,000 was reported in his corporation tax return and the return was filed with the government—the same people who got the other return. He made a full and complete disclosure, so there could not be any possible concealment.

The Court:

Let me ask you a question. If I had a corporation and that corporation was in the red, and I made an individual transaction and transferred my individual transaction to the corporation return while I pocketed the money, wouldn't that be a form of concealment?

Mr. Cunningham:

The evidence shows that this corporation, the M. J. Harris Company, had existed for a good many years and had done business for many years, and its only business was the real estate business.

The Court:

It was engaged in the buying of stamps, too.

Mr. Cunningham:

There was some record of expense items in the purchase of stamps, but my contention is that the Government was fully informed as to the amount of the commission which is in issue here.

The Court:

The whole question in my mind here is who earned the $45,000, and if the individual earned it did he knowingly and wilfully conceal the fact.

Mr. Cunningham:

It is our contention here that it is a corporate thing.

The Court:

I am unable to agree with you that the Government has information that they can immediately single out whether the $45,000 commission was earned by the individual or by the corporation which he controlled.

Mr. Cunningham:

When they examined the two returns they could readily find that he had made a complete disclosure, and sppposing that it should have been filed in his individual tax return they could have adjusted it.

The Court:

I think that is a proper question for the Jury. This is not a clear cut case. . . . your quotation from the Spies case ended up with "and any conduct".

Mr. Cunningham:

I think they limit that to the fact that it would be something you would hide.

The Court:

There could be no cleverer way to hide an individual income than to hide it in a corporation which would pay no taxes on the item if the Government accepted the corporation as having earned the income. I don't know of a better way to do it.

Mr. Cunningham:

Let me call your attention to the Sherman case where the Court mentions the various frauds.

The Court:

I heartily agree with the statements of fraud we have talked about before—I think there should be no question of those. Let me see that exhibit—that closing statement.

Here he discusses a $45,000 commission to be paid on the purchase of his home. That is evidence to me that the $45,000 was his—maybe he borrowed it—I don't know.

Mr. Cunningham:

I want to direct your attention to the case of U.S.A. vs. Cole, which is probably as close a parallel case as you could find. This case involved an estate tax return wherein it was alleged they filed a false and fradulent estate tax return, and it contended they omitted certain assets that should have been contained therein, but in the estate tax return they had made an entry to the effect that there were certain stocks referred to therein as owned by others.

The Court:

I have read that case.

Mr. Cunningham:

I think this is probably as good a reasoning as the Spies case, although the Court does refer to the Spies case and

quotes at considerable length from it, and he finds in this situation, which is very parallel to our case, instead of its being an act of concealment, which he feels is the gist of this offense, it is rather an act of revealment.

The Court:

What you are arguing is that there must be a clear and convincing evidence of concealment. Now, I feel at the present state of the record that the man was hiding behind the corporation to avoid paying taxes, and if I were to decide on it in its present state I could decide in no other way.

I am going to overrule your motion with a right to renew. I am not contending against your law—I think that is all right.

Mr. Cunningham:

I do have a case here that if a corporation does exist, and I think we have enough evidence now. . . .

The Court:

This corporation couldn't transact legitimate business here. It couldn't sell real estate or collect a commission here.

Mr. Cunningham:

He was associated with Billy Ware.

The Court:

That would have to be established. The evidence so far doesn't show it.

Mr. Cunningham:

I have a letter from the Florida Real Estate Commission to the effect that the corporation could transact business here in association with a local broker.

The Court:

It can under certain circumstances. They can get together if they want to send a customer from Ohio. . . .I have read those cases too. . . .they can under certain circumstances.

Mr. Cunningham:

My further contention is that this was a corporate effort, and the fraud might have existed had it not been reported in the corporate return.

The Court:

That might be proof of fraud rather than dis-proof. This could be a very clever scheme to avoid taxes. I happen to know of circumstances where taxes were avoided that way, and I guess you do too, where it was shifted from an individual to a corporation.

Mr. Cunningham:

The Court well knows that the matter of tax avoidance is perfectly proper and legal.

The Court:

Up to a point.

Mr. Cunningham:

If he was acting as a corporation you can be sure he would have to report this through the corporation and nobody else. In the famous Moline case. . . . .in that particular case they attempted to eliminate the liability as far as the corporation was involved and Riley took it to the Supreme Court and they held it was taxable to the corporation even though the corporation only existed for the purpose of handling a particular piece of real estate, and they went to the Court of Appeal and to the Supreme

Court, and the Supreme Court held that the man must report it through the corporation, and pay the taxes on it through the corporation.

The Court:

If you can establish that the corporation sent the customer down here you might have a fairly good chance of setting this up, but I don't know how you can get away from the fact that the man himself got the $45,000.

Mr. Cunningham:

I think what was done with the funds is not controlling.

The Court:

It is not controlling. . . . none of this is controlling. We are talking about whether or not there was evidence to permit this matter to go before the Jury, and I think there is.

I am going to overrule the motion.

Let's adjourn until Monday morning.

Mr. Rosen:

What about Mr. Nisenson?

The Court:

If he wants to subpoena him to keep him here, all right. Otherwise he can go home.

The Court will stand adjourned until 9:30 Monday morning.

(The trial reconvened at 9:30 a.m., Monday, April 2, 1956, pursuant to adjournment of Thursday, March 29, 1956.)

A.M. Session.

The Court:

Do you each waive polling of the jury, and concede they are present?

Mr. Cunningham:

Yes, sir.

Mr. Rosen:

Yes, sir.

The Court:

You may proceed with the defense.

Mr. Cunningham:

Ladies and gentlemen of the jury, as we started at the outset of this case, we would waive our opening statement herein until after the closing of the Plaintiff's case.

You will recall Mr. Rosen made a brief statement at the opening consisting primarily of reading to you of the indictment with a very brief statement in connection with that to the effect that the defendant, Milton J. Harris, had filed a false and fradulent income tax return for the year, 1946.

Subsequent to the filing of that indictment we filed a motion for a bill of particulars. The Court at that time ordered the government to supply us with a bill of particulars. That means just what it says—a statement advising us with more detail just what the offense is charged against the defendant. The Court ordered them to file such bill with these specifications: Paragraph (a) "The general category and amount in each general category making the gross income alleged to have been received by defendant for the calendar year 1946."

In other words, the government was required to set forth what they were going to contend was the gross income of the defendant for this calendar year.

Paragraph (b) was as follows:

"The general category and amounts allowed or disallowed by the Government in determining the net income which is charged against the defendant. Included in this shall be personal expenses allowed or disallowed, stated in a general category."

Now, ladies and gentlemen, the bill of particulars was filed, and the Government answered paragraph 2 of the order as follows:

"(a) Net gain from the Sale of Capital Assets—$23,163.83.

Insurance Agency Fees—$710.98.

Real Estate Commissions—$45,000.00."

Now, Government Exhibit 1 is the income tax return involved herein. I have here in my hand a photostatic copy of this return, and this was supplied to me by the government, and it is a copy of the original one filed with the Collector—now Director—of Internal Revenue at Jacksonville, Florida.

In respect to items as to gross income—money coming in to him—an examination of this Government Exhibit 1 will reveal that capital assets were reported in the amount of $23,162.83. This is the same amount—so there is no question that the government hasn't questioned the matter of reporting of capital assets. They say that is the truth.

The next item is the item of Insurance Agency Fees—$710.98. This was set forth on Page 2 of the income tax return of Milton J. Harris, and the amount set forth in the return and the amount set forth in this bill of particulars are the same, so there is no question about that.

The next item there is that of Real Estate Commissions—$45,000, and this amount of $45,000 is what this case is all about; and that amount is set forth in the income tax return of the M. J. Harris Company for the calendar year, 1946.

Mr. Rosen:

Excuse me . . . . this sounds more like a closing argument than an opening statement.

The Court:

Mr. Cunningham, just tell them what you are going to attempt to prove.

Mr. Cunningham:

There is one more item—the amounts allowed. You will recall in the Court's order regarding the bill of particulars it says, "The general category and amounts allowed or disallowed by the Government in determining the net income which is charged against the defendant."

Now, in the bill of particulars it shows, "Operating expenses Allowed Per Return—$28,714.28. Contributions, Real Estate & Sales Taxes Allowed—$814.01."

In the bill of particulars they have not questioned the matter of deductions taken by this defendant; so we can see that the only item before this jury is the item of the $45000 real estate commission.

The evidence the defense in this case will disclose is that the M. J. Harris Company is a Cleveland, Ohio corporation, existing from 1928 until the time of its dissolution in 1946.

The evidence will disclose that the M. J. Harris Company through its president and representative, Milton J. Harris, negotiated this contract with Gordon Macklin.

It will show the Carl G. Fisher Corp. had this property for sale and the Gordon Macklin Company of Cleveland, Ohio, were the purchasers from Fisher, and that the representative of the Gordon Macklin Company that came here to negotiate--his expenses were paid by the M. J. Harris Company.

The evidence will further show that the M. J. Harris Company properly entered this transaction on its books and records and reported it in its income tax return.

This case has come up some ten years after this tax return was filed, and many of the people involved are now dead and the difficulties in connection with that are obvious to anyone; and it is our contention, and the evidence will show, that the income was that of M. J. Harris Company and properly reported by the M. J. Harris Company.

Now, this letter of October 1, 1946 from Macklin Operated, Inc., to Mr. Hart McKillop, Lawyers Title Insurance Corp. was identified by Mr. Kerr at the time he was here, and I would like to have this admitted in evidence now.

Mr. Rosen:
No objection.

The Court:
Admitted.

(Marked as Defendant's Exhibit 1.)

Mr. Cunningham:
Ladies and gentlemen of the jury, the letter just admitted into evidence is signed by Mr. G. S. Macklin, and

I just want to call your attention to the letterhead. I will not read it now.

Now, if the Court please, I would like to have admitted in evidence the letter of the Flamingo to Lawyers Title Insurance Corp. that was identified by Mr. Kerr at the time he was on the witness stand.

Mr. Rosen:

I don't see the materiality, but I have no objection.

The Court:

Admitted.

(Marked as Defendant's Exhibit 2.)

Mr. Cunningham:

The next item is a business calling card identified by Mr. Kerr as a part of the record of Lawyers Title.

Mr. Rosen:

This not being the card of the defendant, and just being a card in the file, I fail to see the materiality. I believe there would have to be further evidence to draw any inference from this card. It does not have the defendant's name on it at all.

The Court:

I think so. I will sustain the objection.

Mr. Cunningham:

I would like to have admitted in evidence the Corporation Record, which was identified as Defendant's Exhibit 4 for Identification.

———

Mr. Rosen:

I believe it will take me a little time to examine this.

The Court:

We will defer ruling on it. Go ahead, Mr. Cunningham.

Mr. Cunningham:

I would like him to take time to examine it now, Your Honor. They subpoenaed the records and they have had it for some time ,and it is consistent with the proof at this time. If he wants to take time I have no objection, but I think they have had this long enough to know what is in it.

Mr. Rosen:

No objection, Your Honor. We regret the delay.

The Court:

Let it be admitted.

(Marked as Defendant's Exhibit 4.)

Mr. Cunningham:

Now, ladies and gentlemen, there a couple of instrument here I would like to read to you.

Mr. Rosen:

Object to reading any portion of the exhibit without the entire matter being read into the record.

Mr. Cunningham:

I don't want to bore the jury with a lot of detail.

The Court:

Go ahead and read all of any one page, and the Government of course, can read the rest of it if it sees fit.

Mr. Cunningham:

What I would like to read for the benefit of the jury, if Your Honor please, are the articles of incorporation.

(Reading) "Articles of Incorporation of The M. J. Harris Company.

The undersigned, a majority of whom are citizens of the United States, desiring to form a corporation, for profit, under the General Corporation Act of Ohio, do hereby certify:

First: The name of said corporation shall be The M. J. Harris Company.

Second. The place in Ohio where its principal office is to be located is 614 Swetland Bldg., Cleveland, Cuyahoga County.

Third. The purpose or purposes for which it is formed are: To take, purchase, or otherwise acquire and to own, hold, sell, convey, exchange, hire, lease, rent, pledge, mortgage, "and otherwise deal in and dispose of all kinds of real estate, real property, personal property, chattels, chattels real, choses in action, notes, bonds and mortgages.

Fourth. The maximum number of shares which the corporation is authorized to have outstanding is One Hundred (100) all of which shall be with a par value of Five and 00/100 Dollars ($5.00) each.

Fifth. The amount of capital with which the corporation will begin business is Five Hundred and 00/100 Dollars, ($500.00).

In Witness Whereof, We have hereunto subscribed our names this 17th day of December, 1928. (Signed) Milton J. Harris, Sylvia Harris, Sydney M. Better.

The State of Ohio,
County of Cuyahoga, ss:

Personally appeared before me, the undersigned, a Notary Public, in and for the said county, this 17th day of December, 1928, the above named Milton J. Harris, Sylvia Harris, and Sydney M. Better, who each severally acknowledged the signing of the foregoing articles of incorporation to be his free act and deed, for the uses and purposes therein mentioned.

"Witness my hand and offical seal on the day and year last aforesaid.

(Seal) EVERETT F. ADAMS,
Notary Public."

On the back of this instrument we have:

"United States of America, State of Ohio, Office of the Secretary of State.

I, Clarence J. Brown, Secretary of State, of the State of Ohio, do hereby certify that the foregoing is an exemplified copy, carefully compared by me with the original record now in my official custody as Secretary of State, and found to be true and correct, of the Articles of Incorporation of The M. J. Harris Company, filed in this office on the 18th day of December, 1928, and recorded in Volume 370, Page 291 of the Records of Incorporation.

Witness my hand and official seal at Columbus, Ohio, this 18th day of December, 1928. Clarence J. Brown, Secretary of State, (Seal)."

I now wish to read a Certified Resolution:

"The undersigned, Secretary of The M. J. Harris Company hereby certifies that the following is a true and correct copy of resolutions duly adopted at a regularly convened meeting of the Board of Directors of said Company held at Cleveland, Ohio on the 21st day of December, 1928, a quorum then being present:

Resolved: That the Cleveland Trust Company of Cleveland be named one of the depositaries of this Company and that funds so deposited be withdrawn only upon the check, draft, note or order of the Company signed by any of the following named officers, to-wit, Milton J. Harris, whose signatures have been duly certified to the Cleveland Trust Company, and the said Trust Company is hereby authorized to pay such checks, drafts, notes, trade acceptances or orders, and also to receive the same for the credit of or in payment from the payee or any other holder when so signed, without inquiry as to the circumstances of their issue or the disposition of their proceeds, whether drawn to the individual order of, or tendered in payment of individual obligations of the officers named above, or of other officers of this Company, or otherwise.

Resolved: That any of the following named officers, Milton J. Harris, President, be and they respectively are and shall be now and hereafter authorized to effect loans, advances, and renewals at any time for this Company from The Cleveland Trust Company, Cleveland, Ohio, any such loans or evidences of indebtedness of this Company,

to be signed by the said officers above mentioned, and as security for the payment of any and all loans, advances, indebtedness, and liabilities of this Company, said officers are authorized to pledge, hypothecate, assign, transfer, indorse, and deliver any and all stock, securities, commercial paper, bills receivable, accounts receivable, claims, or (and) other property at any time held by this Company; also that the said officers are authorized to sell to or discount with the said The Cleveland Trust Company, any and all commercial paper, bills receivable, accounts receivable, and other instruments and evidences of debt at any time held by this Company and to that end to indorse, assign, transfer, and deliver the same and said Trust Company may at any time apply any money or property in its hands belonging to this Company on the payment of any indebtedness of this Company, whether due or not.

Resolved: That all loans, discounts, notes and advances heretofore obtained upon behalf of this Company or held by the said The Cleveland Trust Company and charged against this Company on the books of the said The Cleveland Trust Company and now held by said bank are hereby approved, ratified, and confirmed.

Resolved Further: That a certified copy of these resolutions be sent to said The Cleveland Trust Company and that they shall remain in full force until written notice of modification or termination shall have been given to The Cleveland Trust Company, of Cleveland, Ohio, and until all indebtedness which may have been incurred as aforesaid shall have been fully paid and satisfied.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the said Corporation this 21st day of December, 1928.

Dated at Cleveland, Ohio, December 21st, 1928. (Signed) E. T. Johnson, Secretary."

The next portion of the record I want to read to you is the Certificate of Dissolution.

"Certificate of Dissolution—By Resolution of Shareholders of The M. J. Harris Company.

Milton J. Harris, President, and E. T Johnson, Secretary, of The M. J. Harris Company, an Ohio corporation, the articles of which were filed in the office of the Secretary of State, on the 18th day of December, 1928, do hereby certify that

First. That name of this corporation is The M. J. Harris Company.

Second. The place where its principal office is located is 516 Swetland Building, Cleveland 15, Ohio.

Third. The names and post office addresses of its directors and officers, together with the street and number or other particular description of each address, are: Milton J. Harris, President, Treasurer and Director, 516 Swetland Building, Cleveland, Ohio; E. T. Johnson, Vice President, Secretary and Director, 516 Swetland Building, Cleveland, Ohio; H. Harris, Director, 516 Swetland Building, Cleveland, Ohio.

Fourth. Said corporation elects to wind up and dissolve.

The undersigned have been authorized to execute and file this certificate by a resolution adopted at a special

meeting of the sharenolders of said corporation, notice of which was given to all shareholders of every class, whether entitled to vote or not, by the votes cast in person or by proxy by the holders of record of shares entitling them to exercise two-thirds of the voting power, declaring it to be desirable to and the corporation does elect to wind up and dissolve.

In Witness Whereof, said Milton J. Harris, President, and E. T. Johnson, Secretary, of the M. J. Harris Company, acting for and on behalf of said corporation, have hereunto subscribed their names and caused the seal of said corporation to be hereunto affixed, this 13th day of August, 1946.

The M. J. Harris Company—By Milton J. Harris, President. By E. T. Johnson, Secretary.

The State of Ohio, County of Cuyahoga, ss: The above named Milton J. Harris and E. T. Johnson being duly sworn depose and say that they are the President and Secret ary, respectively of the M. J. Harris Company, that they executed the foregoing certificate and that the facts therein stated are true.

Subscribed and sworn to before me, this 13th day of August, 1946.

Gabriel Leeb, Notary Public (Seal)."

The Court:

When was that filed?

Mr. Cunningham:

That would be on the certificate of the Secretary of State. I will read that:

"United States of America, State of Ohio, Office of the Secretary of State.

I, Edward J. Hummel, Secretary of State, of the State of Ohio, do hereby certify that the foregoing is an exemplified copy, carefully compared by me with the original record now in my official custody as Secretary of State, and found to be true and correct, of the Certificate of Dissolution of The M. J. Harris Company, filed in this office on the 14th day of August, 1946, and recorded in Volume 501, Page 692, of the Records of Incorporations.

Witness my hand and official seal at Columbus, Ohio, this 14th day of August, 1946. (Seal) Edward J. Hummel, Secretary of State."

Mr. Cunningham:

Now, if the Court please, I have a telegram from P. C. Williams, and I would like to have this telegram admitted.

The Court:

Let me see it.

Mr. Rosen:

Object, Your Honor. There is no testimony identifying it in any way.

The Court:

Sustained.

Mr. Cunningham:

Could I be heard on the matter very briefly.

(Thereupon the jury retired from the Court room and the following proceedings were had.)

Mr. Cunningham:

I would like this marked for identification, please.

(Marked as Defendant's Exhibit 9 for Identification.)

Mr. Cunningham:

If the Court please, this is a telegram from P. C. Williams, District Director of Internal Revenue for the Northern District of Ohio, and it is relative to the obtaining of copies of the income tax returns and the partnership returns of Milton J. Harris and Gabriel Feigenbaum. There was partnership income referred to in the 1946 income tax return of Mr. Harris, which is the return involved here, and at the pre-trial conference it was agreed that these returns would be admissable.

The Court:

I don't think they have anything to do with this case. The taxpayer said he filed them, and the government admitted it.

The Court:

What is the object of this—to prove the taxpayer and the partner made a mistake?

Mr. Cunningham:

The purpose of this telegram is to show the inaccessibility of the original return of the Harmon Investment Company, and the inaccessibility of the partnership return.

The Court:

Do you have copies here?

Mr. Cunningham:

I do, but I have to lay a foundation.

Mr. Rosen:

I have never seen one, and I don't know if it would be a copy or not.

Mr. Cunningham:

I think the evidence will prove there were certain credits he was entitled to and didn't take, and it all goes to willfullness.

The Court:

Did he sign it?

Mr. Cunningham:

No, sir. It is the taxpayer's retained copy of the return.

The Court:

The telegram is not admissible. The fact he said he was going to make a return doesn't mean anything.

Mr. Cunningham:

Let me state the background of the telegram. We requested by letter copies of these returns and they were not forthcoming, and I called the head of the returns processing branch in Cleveland, Ohio, and he said they were not at this time available. I asked him to send me a wire to that effect to show my efforts to attempt to obtain the original returns.

The Court:

I think the case will be won or lost on that $45,000 commission anyway. Secondary evidence may be brought in; however, I don't think the wire should be admitted. If you will state it has been destroyed you can testify to that.

Mr. Cunningham:

The wire states that.

The Court:

I don't think the government will object to secondary evidence, but you can't use the wire.

Bring the jury back.

(Thereupon the jury was returned to the Courtroom and the following proceedings were had.)

The Court:

Do you each waive polling of the jury and concede they are present?

Mr. Cunningham:

Yes, sir.

Mr. Rosen:

Yes, sir.

Mr. Cunningham:

If the Court please, I would like to call Mr. Fincher.

Thereupon—THORNTON M. FINCHER, a witness called on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct Examination.

(By Mr. Cunningham):

Q. Will you state your name?

A. Thornton M. Fincher.

Q. And where do you reside?

A. Coral Gables, Florida.

Q. And what business are you engaged in?

A. Vice president of the Security Trust Company, and other companies.

Q. How long have you been employed by the Security Trust Company?

A. Ever since it was formed in 1938.

Q. You say you are an officer of other companies?

A. Yes, sir, several.

Q. Are you an officer of the Carl G. Fisher Corporation?

A. Yes, still am.

Mr. Cunningham:

I would like this instrument marked for identification.

(Marked Defendant's Exhibit 10 for Identification.)

Q. I hand you this instrument which has just been marked for identification, and look at it and state generally what it is.

A. It is ten years ago, my boy . . . this is just a sales contract. We sold the property for 1¼ million dollars and allowed them to place a first mortgage, and took cash and the second mortgage.

Q. Is this a sales contract?

A. Agreement for sale.

Q. Does it involve the sale of the Flamingo Hotel?

A. Yes, and 20 or 30 acres of land.

Q. Does your name appear on that?

A. Yes, I was Secretary of the corporation at that time.

Mr. Cunningham:

I want to tender this in evidence.

Mr. Rosen:

No objection.

The Court:

Let it be admitted.

(Marked Defendant's Exhibit 10.)

Q. Do you recall this transaction of the sale of the Flamingo Hotel?

A. Yes, sir.

Q. Will you state the name of the purchaser, as you recall it?

A. Gordon Macklin & Company, of Cleveland, Ohio.

Q. Do you recall the real estate agents handling this transaction?

A. Milton J. Harris and Billy Ware.

Q. Did you know Billy Ware at that time?

A. Yes.

Q. Had you known him for some time?

A. Yes, sir.

Mr. Cunningham:

Now, if the Court please, I would like to have that business card identified as Defendant's Exhibit 3 for Identification admitted in evidence at this time.

Mr. Rosen:

Same objection.

The Court:

Same ruling.

Q. Do you recall Gordon Macklin coming down at the time of this transaction?

A. Yes, sir.

Q. Was he accompanied by anybody at that time?

A. He had an attorney in Miami named Bemis.

Q. Where was Bemis from?
A. Cleveland.
Q. You say you knew Billy Ware?
A. Yes.
Q. Did you know the name of his firm?
A. I didn't know he had one.
Q. You didn't know that?
A. No.
Q. Do you know whether he is still living, or dead?
A. He is dead.
Q. Did you know Milton J. Harris before the time of this sale?
A. I don't think I ever saw him before.
Q. Did you know Gordon Macklin before this time?
A. No, I never saw him until this deal.
Q. Do you know whether he is now living or dead?
A. He is dead, too.

Mr. Cunningham:
No further questions.

Mr. Rosen:
No questions.

(Witness excused.)

Thereupon—MILTON M. CHAPMAN, a witness called on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Cunningham:
Q. Please state your name, and your address?
A. Milton M. Chapman, 29 Indian Creek Island.

Q. And what business are you in?
A. I am not active at the present time.
Q. Are you retired?
A. Not permanently—just temporarily.
Q. What was your former employment?
A. I was in the hotel business.
Q. Did you have any connection with the Shelborne Hotel?
A. Yes, I did.
Q. And during what period did you have connection with that hotel?
A. Immediately after the War when the hotel was released by the Army. I think it was 1945 or '46.
Q. And what was your capacity there?
A. I was Managing Director at that time.

Mr. Cunningham:
Please mark this.

(Instrument marked as Defendant's Exhibit 11 for Identification.)

Q. I hand you this instrument and ask you to state generally what that is?
A. It is a statement.
Q. Statement of what?
A. Of a guest having an account with the hotel. That's the way we kept our records.
Q. An account with the Shelborne Hotel?
A. Yes, sir.

Mr. Cunningham:
I would like to have this statement admitted in evidence.

The Court:
Any objection?

Mr. Rosen:

Let me ask a question; Mr. Chapman, do you have any personal knowledge concerning this statement?

The Witness:

No, except that was the type of statement we used in handling our guests' accounts.

Mr. Rosen:

I will have to object to it. There is no showing of any date at all on this entire statement other than months and days—no showing of any year.

The Court:

Can you find any date on that, Mr. Chapman, that would show the year?

The Witness:

It doesn't say what year.

The Court:

I will sustain the objection.

Q. Did you know Gordon Macklin?

A. Yes, sir, I had the pleasure of meeting him.

Q. Do you know if he was a guest of the hotel in 1946?

A. Yes, he was.

Q. And you were the manager of the hotel at that time?

A. I was.

Mr. Cunningham:

Will you mark this, please?

(Instrument marked Defendant's Exhibit 12 for identification.)

Q. I hand you what has been marked Defendant's Exhibit 12 for Identification, and will you state generally what that is?

A. It looks to me like a check payable to the Shelborne Hotel.

Q. Does it contain a date?

A. Yes; July 18, 1946.

Mr. Cunningham:

I would like to have it admitted as evidence.

Mr. Rosen:

No objection to the check.

The Court:

Admitted.

(So marked.)

Q. I hand you Defendant's Exhibit 12, and now will you state what it is?

A. It is a check made payable to the Shelborne Hotel for $277.75, signed by Milton J. Harris. It is drawn on the Cleveland Trust Company, Cleveland, Ohio.

Q. It is a check of what company?

A. The M. J. Harris Company, Real Estate Brokers, 516-517 Swetland Building, Cleveland, Ohio.

Q. Was that check received by the Shelborne Hotel?

A. Apparently so. It says on the back, "For Deposit Only, Shelborne Hotel—Shelborne Hotel Operating Company."

Q. After examining that check and that statement before you, can you state now the date that statement was used by the Shelborne Hotel?

Mr. Rosen:

Just a minute. I object once again to any reference to the statement.

The Court:

Sustain the objection.

Q. Mr. Chapman, you say you recall the visit to the hotel of Gordon Macklin in 1946?

A. I do.

Q. Can you now state when Mr. Macklin was at the hotel in 1946, after examining that check?

A. It doesn't say anything with reference to Mr. Macklin on the check. However, his name appears on this statement.

Q. Could you now say he was a guest of the hotel in July of 1946?

A. I will have to go back on my memory. He was there during that Summer

Mr. Cunningham:

If the Court please, in view of the testimony I ask now that the statement be admitted in evidence.

Mr. Rosen:

Same objection.

The Court:

Sustained. I think you have established he was there during that Summer, but that undated paper doesn't help very much.

Q. Mr. Chapman, are the amounts of the check of the M. J. Harris Company, and of the statement, equal amounts?

A. Yes; the amount of the check is the same as the total amount on the statement—$277.75.

Mr. Cunningham:

Now, if the Court please, I would like to re-offer the statement.

The Court:

You don't need it now, do you? You have already gotten away with it.

Mr. Rosen:

Same objection.

The Court:

Sustained. It is immaterial.

Q: Assuming, Mr. Chapman, that more than one guest is at the hotel at a particular time and they are all charged to one account, what is done with respect to the statement? What is the usual practice?

A. We would usually show a notation immediately after the name, like appears here.

Q. What would happen if one person of the group checked out of the hotel?

A. We also carried it on a check-out book—the check-outs for the day.

Mr. Cunningham:

I again ask that the statement be admitted in evidence.

The Court:

Denied.

Q. Mr. Chapman, do you know the defendant here, Mr. Milton J. Harris?

A. Yes.

Q. How long have you known him?

A. About ten years—maybe a little better.

Q. Have you known him here in the Miami area?

A. Yes, sir.

Q. Have you had any associations with him?

A. Yes, when I first became associated with the Shelborne Hotel Mr. Harris had an interest in the hotel.

Q. Did you have any contacts with him socially, other than business contacts?

A. I think maybe twice I have had dinner with Mr. and Mrs. Harris.

Q. Do you have mutual friends?

A. Yes.

Q. Do you know his general reputation in the community?

Mr. Rosen:

For what?

The Court:

Do you know his general reputation in the community for truth and veracity?

The Witness:

Yes, he has a good reputation—very truthful.

Q. Do you know his general reputation as to his character?

Mr. Rosen:

Object It is not a proper question.

The Court:
Sustained.

Mr. Cunningham:
No further questions.

Cross Examination.

By Mr. Rosen:

Q. Mr. Chapman, examining Defendant's Exhibit 12 by itself without the aid of that alleged statement, can you state positively that that check was applied on an account?

A. No, I can't say that.

Q. You have something stamped on the back with one of your stamps from the Shelborne Hotel. Will you read that?

A. "Applied on account $277.75 cash", with the initial "E"—I presume that is the initial of the cashier that cashed the check.

Q. Isn't it a fact, Mr. Chapman, that these two lines on the check—the top line is for checks that are applied on a person's account, and the second line is to be filled in in the event it is cashed rather than applied on an account? Isn't that correct?

A. That is usually the procedure, yes.

Q. So that this $277.75, being on the line applying on account means it was applied on someone's bill; is that correct?

A. I believe so . . . apparently, yes.

Q. And if it were just cashed this same amount would appear in the other line?

A. That could be . . . I don't know how this check was handled.

Q. If it were just simply cashed by a person staying at the hotel that same amount would appear in the

"cashed" line; isn't that correct, and that would indicate it was not applied to any account?

A. That is correct.

Q. That's the way you handled your accounts over there so that the bookkeeper could distinguish between a check cashed for someone and a check applying on someone's account?

A. Yes.

Q. And if it were simply cashed it would be so marked on this "cashed" line?

Mr. Cunningham:

Object, Your Honor. He is arguing with the witness.

The Court:

It is cross examination. He can argue a little bit with the witness.

A. Yes, the check would be marked "cashed".

Mr. Rosen:

If the Court please, I would like these four checks I have here marked for identification.

(Said checks marked Government's Exhibits 13, 14, 15 and 16 for Identification.)

Q. Mr. Chapman, I hand you Government's Exhibit 13 for Identification and ask you if you can identify that check?

A. Well, it is a M. J. Harris Co. check, made payable to the Shelborne Hotel in the amount of $400.00.

Q. What is the date of that?

A. It is dated 10-24-46.

Q. What is the check number?

A. Number 7546.

Q. I ask you to turn it over on the reverse side and ask you if the indorsement of the Shelborne Hotel appears thereon?

Mr. Cunningham:
Object, Your Honor.

The Court:
Sustained.

Mr. Rosen:
It is a matter of identification whether that is the bank stamp of the Shelborne Hotel.

The Court:
Just ask him who indorsed it? Don't ask him what appears on there.

Mr. Rosen:
He is on cross examination.

The Court:
But you cannot inquire as to the contents on an item not in evidence.

Q. Mr. Chapman, do you know who indorsed this check?

Mr. Cunningham:
Object if he states.

The Court:
He can state if he knows.

A. It is stamped by the Shelborne Hotel.
Q. Is that for deposit.

Mr. Cunningham:
Object. That is something I didn't go into if he wants to call him back as his witness.

The Court:
He can identify them only: Do you have any other checks to identify?

Mr. Rosen:
Yes, sir.

The Court:
Mr. Chapman do you know whose checks these are—Exhibits 14, 15 and 16?

The Witness:
The M. J. Harris Company, $200.00.

The Court:
Don't say what is on them.

Q. Whose indorsement appears?
A. They are stamped by the Shelborne Hotel.
Q. And this next check—what is on the reverse side?

Mr. Cunningham:
Object as to the contents.

The Court:
Sustain the objection as to the contents.

Q. Mr. Chapman, I hand you Exhibit 16 for Identification and ask you to identify it if you can?

A. M. J. Harris Company, 10-1-46, Check #7516, payable to the order of the Shelborne Hotel.

Q. And do you recognize the stamp on the reverse side?

A. Yes, the stamp of the Shelborne Hotel.

Q. Now, you have testified on direct examination as to the reputation of the defendant for truth and veracity; is that correct?

A. Yes, sir.

Q. I saw you in the Courtroom earlier today but you were not in the Courtroom last week, were you?

A. No, sir.

Q. Did you hear any of the testimony in this case?

A. No, sir.

Q. Other than what someone may have told you are you familiar with the facts in this case?

A. I didn't know anything about the case until I came here this morning.

Mr. Rosen:

Thank you. That's all.

Mr. Cunningham:

No further questions.

(Witness excused.)

Thereupon—PAUL C. WIMBISH, a witness called on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct Examination.

Q. Please state your name and your address?

A. Paul C. Wimbish, 5300 LaGorce Drive, Miami Beach.

Q. How long have you lived in this community?
A. About twelve years.
Q. In what business are you engaged?
A. I am a real estate broker.
Q. Are you acquainted with the defendant, Milton J. Harris?
A. I am.
Q. How long have you known him?
A. About eight years.
Q. Have you been associated with him in business way at any time?
A. Yes, I have.
Q. Have you been associated with him socially?
A. Yes I have.
Q. Do you have mutual friends?
A. We do.
Q. And do you know his general reputation in the community for truth and veracity?
A. I believe I do, yes.
Q. Will you state what that is?
A. He enjoys an excellent reputation.

Mr. Cunningham:
No further questions.

Cross Examination.

By Mr. Rosen:
Q. Are you familiar with any of the facts in this case?
A No, sir.

Mr. Rosen:
That's all.

(Witness excused.)

Thereupon—JOE COHEN, a witness called on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Cunningham:

Q. Will you state your name, please?

A. Joe Cohen.

Q. And your address?

A. 5985 Alton Road.

Q. How long have you resided in this area?

A. About thirty-one years.

Q. In what business are you engaged?

A. Real estate business.

Q. How long have you been engaged in the real estate business?

A. Twenty some years.

Q. Where?

A. 1657 Drexel Avenue, Miami Beach.

Q. Are you acquainted with the defendant, Milton J. Harris?

A. Yes, very much so.

Q. How long have you known him?

A. I have known him for around ten years, and he has been associated with me in my office for the last five or six years.

Q. Have you associated with him socially at any time?

A. Yes.

Q. You have mutual friends?

A. Yes, we do.

Q. Do you belong to any mutual organizations together?

A. Yes, to the Jewish temple. We have been to several functions together and different affairs.

Q. Do you know his general reputation in the community for truth and veracity?

A. He has been in my office for the last five years and our relationship has been excellent. I have always found him trustworthy, and his reputation, generally speaking, is the best I know of.

Mr. Cunningham:

No further questions.

Cross Examination.

By Mr. Rosen:

Q. Mr. Cohen, are you familiar with any of the facts in this case?

A. Being associated with me in my office. . . .

Q. Just a minute. I am not asking what Mr. Harris may have told you—just what you may know of your own knowledge?

A. No, I heard none of the testimony.

Mr. Rosen:

That's all.

(Witness excused.)

Thereupon—T. C. HOLLETT, a witness called on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Cunningham:

Will you please state your name?

A. T. C. Hollett.

Q. And your address?
A. Coral Gables, Florida.
Q. What business are you engaged in?
A. General insurance.
Q. And where is your place of business?
A. It is now at 1313 Southwest 22nd Street.
Q. How long have you been in the insurance business?
A. Twenty years.
Q. Are you personally acquainted with the defendant, Milton J. Harris?
A. Yes.
Q. How long have you known him?
A. Nine years.
Q. Have you belonged to any organizations of which he is a member?
A. I am a member of the Miami Beach Rotary Club, and Mr. Harris was a member there.
Q. Do you have mutual friends?
A. Yes.
Q. Do you know his reputation in the community for truth and veracity?
A. I do. I think it is the best.

Mr. Cunningham:
You may inquire.

Cross Examination.

By Mr. Rosen:
Q. Mr. Hollett, are you personally familiar with any of the facts in this case?
A. No.
Q. You have never looked at the defendant's books or records?

Mr. Cunningham:
Object to that.

The Court:
Sustained.

Mr. Rosen:
No further questions.

(Witness excused.)

Mr. Rosen:
If Your Honor please, I am going to ask that Mr. Chapman wait a few minutes in the event I should need him.

The Court:
Mr. Chapman will remain. He says he has plenty of time.

Thereupon—E. E. McCARTY, a witness called on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Cunningham:
Q. Please state your name?
A. E. E. McCarty.
Q. And where do you live?
A. 8733 North Miami Avenue.
Q. How long have you lived in the Dade County area?
A. Six years.
Q. In what business are you engaged?
A. I am in the insurance business.

Q. Do you know the defendant, Milton J. Harris?
A. Yes, sir.
Q. Do you have mutual friends?
A. Yes, sir.
Q. Do you know his general reputation for truth and veracity in the community?
A. Yes, sir, I do. It is very good.

Mr. Cunningham.
You may inquire.

Cross Examination.

By Mr. Rosen:
Q. Mr. McCarty, do you have any personal knowledge of this case?
A. No, sir.

Mr. Rosen:
That's all.

(Witness excused.)

Thereupon--THEODORE W. SEWELL, a witness called on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct Examination.

Q. Will you state your name?
A. Theodore W. Sewell.
Q. Where do you reside?
A. 1701 North Treasure Drive.
Q. What business are you engaged in?

A. Stocks and commodities.

Q. How long have you lived in this area?

A. Approximately seven years.

Q. Are you acquainted with the defendant, Milton J. Harris?

A. Yes, I am.

Q. Do you have mutual friends?

A. Yes, we do.

Q. And do you know his general reputation in the community for truth and veracity?

A. I think it is excellent.

Mr. Cunningham:
You may inquire.

Cross Examination.

By Mr. Rosen:

Q. Is your answer the same to the question I have asked the others? Do you have any personal knowledge of this case at all?

A. None whatsoever.

Q. You have not heard any of the testimony.

A. No, except for this morning.

Mr. Cunningham:
Object to the last part.

The Court:
Sustained.

Mr. Rosen:
That's all.

(Witness excused.)

Thereupon—IRVING SHERMAN, a witness called on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct Examination.

(By Mr. Cunningham):

Q. Will you state your name, and where you live?

A. Irving Sherman; 340 North Shore Drive, Miami Beach.

Q. And what business are you in?

A. Real estate.

Q. How long have you lived in this area?

A. Thirteen years.

Q. Do you know the defendant Milton J. Harris?

A. I do.

Q. How long have you known him?

A. About seven years.

Q. Do you have mutual friends?

A. We do.

Q. Do you know his general reputation in the community for truth and veracity?

A. Yes, I do. It is excellent.

Mr. Cunningham:

Your witness.

The Court:

Do you know anything about the facts in his case?

The witness:

No, I don't.

Mr. Rosen:

Thank you, Your Honor.

(Witness excused.)

Mr. Cunningham:

I would like to call Mr. Merling.

Thereupon—ROBERT F. MERLING, a witness called on behalf of the defendant being previously sworn, was examined and testified as follows:

Direct Examination.

By Mr. Cunningham:

Q. Mr. Merling, you have previously testified in this case, have you not, and have been sworn?

A. Yes, I have.

Q. You were present during the testimony of Mr. Nisenson?

A. Yes.

Q. Will you state whether or not you have the investigative report of Mr. Nisenson here?

A. We do have a report, yes.

Mr. Cunningham:

No further questions.

Cross Examination.

By Mr. Rosen:

Q. Do you know what happened to Mr. Nisenson's work papers?

A. Yes, Ido.

Q. What happened to them?

A. They were destroyed by the Revenue Office in Cleveland inadvertently.

Mr. Rosen:
That's all.

(Witness excused.)

The Court:
Call your next witness.

Mr. Cunningham:
If the Court please, the defense rests.

The Court:
The government will proceed.

Mr. Rosen:
I offer these checks in evidence, Exhibits 13, 14, 15 and 16 for Identification.

Mr. Cunningham:
No objection.

Mr. Rosen:
That's all I wanted Mr. Chapman for.

The Court:
Admitted. You can go now, Mr. Chapman.

(Said instruments marked Government's Exhibits 13, 14 and 15, and 16, respectively.)

The Court:
The government rests?

Mr. Rosen:
Yes, sir.

The Court:

The jury will be excused.

(Thereupon the jury retired from the Courtroom and the following proceedings were had:)

Mr. Cunningham:

If Your Honor please, there are several motions I would like to make at this time.

The Court will recall that with respect to certain exhibits and certain testimony the Court permitted me to have the right to renew my objections thereto, and I at this time move to strike Government's Exhibit 7, which was the closing statement with respect to File 1590 of the Lawyers Title Company relative to the house purchased by the defendant, Milton J. Harris.

Also, I would like to ask the Court to strike Government's Exhibit 8, the letter from Mr. Harris to Lawyers Title relative to the house transaction.

I would also like to move to strike Government's Exhibit 9, which is the statement of Mr. Harris identified by the witness, Gardner, a former employee of the Internal Revenue Bureau, who testified as to the signing, except as to Questions 102 to 108 which relate to the Shelborne transaction and the Flamingo sale transaction.

I also move to strike Government's Exhibit 11, which are photostatic copies of documents allegedly submitted to Agent Nisenson by a man named Zwick. I ask that the Court strike those from the record for the reason that no foundation was laid for their admission and they are beyond the scope of the issues since the government in their bill of particulars stated they would not question the matter of deductions.

Also, in that connection, I ask that the testimony of Agent Mehrling be stricken. I think Your Honor stated

I could renew my objection to that at a later time; and also to those exhibits I have mentioned.

Also, I objected to the testimony of Mr. Nisenson in regard to the stamp transactions as not relevant or material, and it should be stricken.

I think those are the only items I have to cover by motion to strike.

Now, I want to renew my motions made in the course of the Government's case, that the Government has failed to sustain the proper evidence . . . to submit sufficient evidence to sustain the indictment. It is our contention that the offense of tax evasion is one of concealment, and that when you tell the government all your income, as it is clear was done in this case, the item was not concealed.

The testimony the Court now has before it that it didn't have before is that the M. J. Harris Company was a duly organized brokerage firm dealing with real estate during the period from 1928 to 1946, which covers the period of the negotiations relative to this transaction which was entered into in July of 1946, and, although the corporation was dissolved the following month the benefits of the commission earned by this corporation were submitted in their return.

I think we have submitted the law in this matter—that a corporation that has completed all its accounts except for the receipt of the money, even after dissolution the corporation shall still report the taxable income; and this income was reported as taxable income consistent with his practice heretofore.

It is our contention that the Government has failed to show the necessary proof to sustain a conviction.

The Court:

I cannot agree with you that this could not be a case of concealment.

Mr. Cunningham:

If it is a dissolution, and the corporation is liquidating

The Court:

I think you have introduced a new element but I don't know that it is very helpful in trying this lawsuit.

Mr. Cunningham:

They said they were going to prove a real estate commission paid to him, and we say it was paid to the corporation; and any money he might have received they would have to prove it was a liquidating dividend and a capital gain.

The Court:

I will deny the motions, except the one about the statement. (Government Exhibit 9.)

Mr. Rosen:

The basis on which we have asked the Court to permit it to remain is to show intent, and that's about all it would be for.

The Court:

The trouble is, Mr. Rosen, the intent from this statement is so garbled I can't be sure whether it bears on intent or not.

(Discussion off the record.)

The Court:

I will leave in Questions 80, 81 and 82.

Mr. Cunningham:

Our objection is to all of it except Questions 102 to the end.

The Court:

I am going to overrule the objection.

Mr. Cunningham:

I want to object further with respect to the matter of Question 80. That is a statement by the Agent himself and is not an admission by the defendant.

The Court:

He said, "I can explain that. It might sound very silly", etc. Make a note of this, Mr. Clerk—80, 81 and 82.

Mr. Cunningham:

You are going to admit questions and answers No. 80, 81 and 82?

The Court:

Yes; and I will admit 19, 20, 21, 22, 23, 24 and 25.

Mr. Cunningham:

I want to particularly object to the admitting of these last numbered items, 20 through 25, particularly with respect to 23, 24 and 25—that to admit them is highly prejudicial and inflammatory, and no foundation or basis has been laid for them.

The Court:

Oh, yes, there is. They confirm the testimony of another witness.

Mr. Cunningham:

With respect to the years contained therein they are beyond the scope of the indictment and the bill of particulars.

The Court:

I am going to overrule you. I will sustain the objection to the rest of them, with the exception of 102 on. Now, I think the best way to do this, Mr. Clerk, is to paste something over the rest of them.

(Said Exhibit received by the Clerk, and all questions and answers covered with the exception of Numbers 19, 20, 21, 22, 23, 24, 25, 80, 81, 82, and from 102 to the end of statement.)

The Court:

Now let's go into the instructions.

Mr. Cunningham:

Mr. Weinstein will argue the instructions, but I would like a copy so that I can follow it through.

The Court:

On defendant's Requested Instruction No. 1 you have crossed out the two words on the next to the last line, and that is all right.

Mr. Rosen:

No objection to that.

The Court:

Number 2 I have refused because of the words, "cannot be found guilty".

Mr. Weinstein:

Can we change that to "will not"?

The Court:

I am going to give you "wilful and knowingly" instructions.

Mr. Weinstein:

May I go on record as requesting that one, and make objection.

The Court:

Certainly, your general objection will carry through on all of these—that is understood. Now, Number 3 I think is all right except for the last sentence.

Mr. Weinstein:

That is in the original language of the Court, and Your Honor has given that charge before.

The Court:

This part here, "He certainly is not wilful if he acts . . ."

Mr. Weinstein:

That part we don't request. That part has been scratched out.

The Court:

The rest of it is all right. Now, Number 4, I have left in the center and scratched out the first sentence—that is an opinion rather than instructions. I don't like instructions that tell the jury something is proper or something is improper. The third paragraph I have eliminated.

Mr. Weinstein:

Our objections will continue along as to that.

The Court:

Now, as to wilfullness I think I have a better one, and so I will refuse that.

Mr. Cunningham:

I would like to hear that, Your Honor.

The Court:

This has been used in a great many cases, and I think it is proper. "To establish its case the Government must prove beyond a reasonable doubt both of the following two elements: that substantial income tax was due and owing from the defendant in addition to that declared in his income tax return; and that the defendant wilfully attempted to evade and defeat such tax.

The gist of the offense charged in the indictment and each count thereof is a wilful attempt on the part of the taxpayer to evade or defeat the tax imposed by the income tax law. The word 'attempt' as used in this law involves two things: one, an intent to evade or defeat the tax, and two; some act done in furtherance of such intent. The word 'attempt' contemplates that the defendant had knowledge and understanding that during the year 1946 he had an income in such year which was taxable and which he was required by the law to report, and that he attempted to evade or defeat the tax thereon, or a portion thereof, by purposely failing to report all the income which he knew he had during such calendar year and which he knew it was his duty to state in his returns for each year.

There are various schemes, subterfuges, and devices that may be resorted to to evade or defeat the tax. The one alleged in this indictment is that of filing false and fraudu-

lent return with intent to defeat the tax or liability. The gist of the crime consists in wilfully attempting to escape the tax.

The attempt to evade and defeat the tax must be a wilful attempt; that is to say, it must be made with the intent to keep from the Government a tax imposed by the income tax laws which it was the duty of the defendant to pay the government. The attempt must be wilful, intentionally done with the intent that the government should be defrauded of the income tax due from the defendant.

The word 'wilful' as used in this statute, means with a bad purpose, or without ground for believing that one's act is lawful, or with a careless disregard whether one has the right so to act. The word 'wilful' as used in this statute, means with knowledge of one's obligation to pay the tax due, and with intent to defraud the government of that tax."

Mr. Weinstein:

We have to make certain objections; first, to the language of the last three paragraphs. I think it would be prejudicial because the jury would think you were referring to the existence of a scheme, subterfuge and device in this case here. We feel that language would be highly prejudicial.

The Court:

Suppose we say, "There are various schemes that may be resorted to . . . "?

Mr. Weinstein:

I think even the word "schem is prejudicial. Can we change that to "way" or "method"?

The Court:

Suppose we say, "various devices".

Mr. Weinstein:

Of course, we make a general objection to it. We say it doesn't specifically differentiate between tax avoidance and tax evasion.

The Court:

The next question is whether this $45,000 was income, and of course we all realize without doubt that he might receive income in several ways; directly, or by dividends from a corporation, or by a liquidation dividend, but here it is charged he received it as a commission.

Mr. Weinstein:

I think the issue should be confined to that.

The Court:

The question here is whether or not he believed honestly that his showing it in the corporation return, which would have no taxes because of a carry-over, was all right.

Mr. Weinstein:

Of course, the grounds for objection are not whether there is reason for criminal liability itself, but as to this man's knowledge of it.

The Court:

I think it is simply a question of whether he knew. I have no doubt but what he evaded taxes from this testimony, but I have some serious doubts as to whether or not a jury would find he was acting criminally, and I think it is up to them. There is doubt in my mind that

I could say off-hand whether he was acting criminally or not.

As regards Number 5, I said no on that because I have wilfullness and intent in the general instructions.

I don't see anything wrong with Number 6.

Mr. Rosen:

I don't see where is applicable here. We have had nothing to compete with except character witnesses and identification of one check.

The Court:

I don't want the fact the government is in here to be mitigated against him. I think I will leave that in.

I will give you Number 6 and Number 7.

I have refused Number 8. I will give general instructions on weight of testimony.

As to Number 9, I am going to give another one on that which I think is better.

Now, Number 10, it seems to me the first paragraph is all right.

Mr. Rosen:

"The essence of this offense is concealment". Wherever you have the word "concealment" you should have the word "fraud" there. That is the language in the fifth line.

The Court:

All right. Now, the second paragraph.

Mr. Weinstein:

Would you give the circumstances of it and something to the fact that this was shown. I think it should be specifically emphasized to the jury.

Mr. Rosen:

Nothing should be specifically emphasized to the jury.

The Court:

It is hard to explain without getting into detail. I will give special instructions that in considering the intent of the defendant they might take into consideration whether or not he cooperated as respects to disclosing any facts when approached by the government agents.

Now, is there anything wrong with Number 11.

Mr. Rosen:

I don't see anything wrong with that.

The Court:

I am going to give instructions that this corporation was a complete entity and was authorized to sell real estate.

Mr. Weinstein:

That is what we had in mind. I took it out of the book of standards. I think those standards should be mentioned as much as the Court will do.

The Court:

All right.

Now, Number 12 will be refused. It is confusing.

Mr. Rosen:

Number 13 doesn't go far enough. There is no evidence here that this was a liquidating dividend.

The Court:

I don't think the word "liquidation" has any place in the instructions.

Mr. Weinstein:

At the time this commission was paid we showed that this corporation was in the process of liquidation. I want them specifically instructed that where the commission is earned prior to liquidation and taken by someone else, nevertheless it was income to the corporation for that particular year as long as the corporation was in existence when the work began on earning it. I might suggest that if we put the word "may" before "constitutes" in the second line, that may take care of Mr. Rosen's objection.

The Court:

That doesn' go far enough. You have to go further to explain it. If such a corporation does make such a sale and the individual takes the income that individual is obligated to report that income.

Mr. Weinstein:

We would have to object because that is not the law.

The Court:

I think it is confusing, and I am going to refuse it. I would be glad to give it if you can work out the details, but if this fellow got a liquidating dividend he would have to report it. I think the obligation continues after dissolution.

Mr. Weinstein:

That might be given in connection with Number 11.

The Court:

Let me get the language here now. Would this cover it? "The fact that a corporation is in liquidation does not relieve it from reporting any income which it receives during the year of liquidation."

Mr. Cunningham:

I think it would be a little more pointed if you would say, "Even if the income is received after the dissolution."

The Court:

When you say, "during the year of liquidation", you have the whole twelve months.

Mr. Rosen:

I think it covers it.

The Court:

You want that after which one?

Mr. Weinstein:

After Number 11.

The Court:

All right. Now, let's try Number 14.

Mr. Rosen:

I have to object to that.

The Court:

I have already marked it "No".

Mr. Weinstein:

This is the law that applied to the evidence in this case, and that is something that should be given.

The Court:

I don't agree that he is free of guilt.

Mr. Weinstein:

I don't believe that is what it says. It is a matter of belief.

The Court:

I am arguing about the wording, "properly should have been included on the income tax return of the M. J. Harris Company, Inc."

Mr. Weinstein.

Providing you find his belief was real.

The Court:

I will give you this one; "You are instructed that if a man believes that income obligations are those of a corporation rather than those of himself, then even though he be entirely wrong he would not be liable for omitting such income from his personal return".

Mr. Rosen.

That is a little strong, Judge. I would like to throw a little water on it.

The Court:

It is the law. That is one case where the law is a good defense.

Now, I am going to refuse Number 15, but that is subject to argument.

On Number 16 I crossed out the first part up to—"Evidence of good character," etc.

Mr. Rosen:

There is no testimony as to honesty and integrity. It is truth and veracity.

The Court:

We will change that wording then. Now, further down

Mr. Weinstein:

The word "it" should be in there after "without". My mistake.

The Court:

I think it is a little strong, but I guess it is all right. I will give Number 17, but I am going to refuse 18. I have one on that.

It's now time for lunch. Court will recess until 2:00 p.m.

P.M. Session.

The Court:

Do you each waive polling of the jury, and concede they are present.

Mr. Cunningham:

Yes, sir.

Mr. Rosen:

Yes, sir.

The Court:

The government will proceed.

Mr. Rosen:

Ladies and gentlemen of the jury, at this time it is the duty of counsel for the government, and for Mr. Cunningham, counsel for the defendant, to review some of the events that you have heard, and point out some of the significant factors of the case.

In a tax case there are two major elements to be shown; one, if there was substantial under-statement of the defendant's income; and two, if such understatement was done wilfully and intentionally.

Now, going into the facts whether there was an understatement or not, Government's Exhibit 1 is the income tax return of the taxpayer which reflects . . . or should I say does not reflect . . . a $45,000 payment made to him when he was acting as a broker for the closing of the Flamingo Hotel deal. Now, the question is; was that income to him? Look at the documents . . . . Government's Exhibits 3 through 8, which are the various letters and closing statements showing the transaction between Mr. Harris and Lawyers Title closing the deal on the Flamingo Hotel. They specifically instruct that the commission be made to Mr. Harris. The closing statement on his home reflects the commission as a credit to him—the commission of $45,000 on the sale of the Flamingo Hotel, and it indicates he used that commission in the purchase of a home.

Now he comes in and says, in effect, "Well, I reported that $45,000 on this corporate return of mine." The fact remains, ladies and gentlemen, that the money never went to the corporation—it went from Lawyers Title Company's escrow fund on the Flamingo Hotel to the escrow fund from which he was personally buying a home.

That $45,000 does not appear on his personal income tax return, but I don't think you can dispute the fact that he received it. The documents are there showing the transfer from one escrow account to the other for his own personal use.

He received it, and he has not reported it, so there you have your under-statement. You have the fact he earned $45,000 and did not report it on his return.

Then you come to the question, did he do it or did he not do it intentionally.

Let's go back a little. You recall the testimony of Mr. Nisenson, who in June, 1946—one month or two months prior to the closing of the Flamingo Hotel deal—he went

in to see Mr. Harris about the 1943 corporate income tax return wherein he said there was a question on the expense items; and he asked Mr. Harris if there could have been some duplication along the line as to his expense items from his personal income from the practice of law, or some such item as that. Mr. Harris explained to him that he was not actively engaged in the practice of law, so there could be no duplication.

Then he asked him about his personal returns so that perhaps they could check and find out if there had been any duplication, and at that point Mr. Harris said, "I haven't filed a personal income tax return since the early thirties." He said he didn't think he had to. At that particular time no big issue was made of it. . . . you will recall the testimony of Mr. Nisenson. . . . but he was told that any income or property or assets that he received by virtue of his efforts on behalf of the corporation was income to him, and must be reported as such. . . . whether it be salary, whether it be dividends. . . . regardless of what you call it. . . . if it were received by him from the corporation for his efforts it would have to be reported.

Nothwithstanding that, Mr. Harris goes ahead and closes the Flamingo Hotel deal about one or two months later; and then some six or seven months later he files his personal tax return and—lo and behold—the $45,000 does not appear therein. That is just one little factor showing that this was done wilfully, and that the man knew what he was doing.

There is very little truth on this income tax return. The name and address, the city and town, are correct. The signature is correct; but let's go into a statement he made on his personal tax return—and I am sure you are all familiar with this question which appears on the return; "If you filed a return for a prior year, what was the latest

year?", and his answer was, "1945". When it asks, "To which Collector's office was it sent?", he answered, "Cleveland".

He knew he had not filed a previous tax return for the year, 1945. He told Mr. Nisenson that he hadn't filed a tax return since the early thirties, and yet here in this return he says he filed a return for the year 1945 in Cleveland, Ohio.

Now, he goes into these very interesting items of expense, and he has a statement typed in on the second page alongside where he listed this $10,768.96 in expenses . . . that is but a portion of his expenses. . . . but after line 17 he has a statement to this effect, "I was a resident of Puerto Rico for the entire year, but maintained offices in Cleveland and Miami Beach at great expense with no income. Established in business there for 23 years so kept up offices, though absent."

So then we go into these very interesting expenses. You will recall the analysis of Mr. Mehrling, and if you ask for the exhibits in the jury room you will note particularly that Government's Exhibit 12 contains expenses for previous years—1943, '44, '45, in addition to 1946—and the only personal return that the government has is the one covering 1946. . . . that is Government's Exhibit 11; so when you compare those be sure you are comparing the 1946 expenses with the 1946 personal return.

Mr. Cnnningham:

I want to object to this statement in view of the objection I made at the time it was brought up during the trial. It was only entered for a limited purpose.

The Court:

You can't object now. You have already objected and the ruling will stand. Don't object now—it throws counsel off—but I am sure you didn't do it purposely.

Mr. Rosen:

Examining the 1946 expenses for both the corporation and the personal return, the analysis shows that of $28714.28 expenses shown on Mr. Harris's personal return, $17605.16 were duplicated and identical items on the corporate return. He took the same expenses in both places.

That, ladies and gentlemen, goes to a man's intent. That shows what a man has in the back of his mind when he keeps books like that.

And speaking about intent, you will recall that I asked Mr. Nisenson who "H. Barber" was, and he said that was Mr. Harris's mother-in-law. Now, in the book of corporate expenses you will find many items payable to H. Barber, who is the defendant's mother-in-law. . . . "Travel—$50.00" . . . many, many others. You will find items here payable to his wife. . . . $250.00 for travel. . . . $600.00 to E. Barber for travel. . . . H. Barber. . . . $410.00 for travel. . . . his mother-in-law and his wife.

You will also recall my asking Mr. Nisenson if he knew of a number of names such as Sanabria, and he gave me a number of names that he said were stamp dealers. You will find throughout this expense sheet that he bought, and duplicated in his personal return, rare stamps from these dealers, and that he charged them up to "Supplies . . . . Advertising . . . Entertainment". That goes to a man's intent.

Then Mr. Cunningham brings out Defendant's Exhibit 12 and he has Mr. Chapman state this was an actual amount spent in connection with the Flamingo deal—$277.75. Then Mr. Chapman thought I was arguing with him, but I was just trying to get an answer from him as to whether this was applied to his account at the Shelborne Hotel, or whether it was a check that was cashed, and finally he stated that on the back of the check there was a stamp that showed it was applied on account and not just cashed.

So then we come up with four other checks, Government's Exhibits 13, 14, 15 and 16, and it was established by Mr. Chapman that these checks were not applied on account, but were cashed for the defendant by the hotel cashier. The first check we have here is Government's Exhibit 13 in the amount of $400.00, dated October 24, 1946, and the Government Exhibit 11 shows under that same date and that same identical amount that it was charged off as "Rent", but the indorsement on the back of the check itself shows this was cashed by the defendant, and not applied on any account.

Government's Exhibit 14 in the amount of $200.00, dated October 31, 1946 appears on his expense sheet as "Rent", but the exhibit says not—it was cashed.

Government's Exhibit 15, dated November 4, 1946, in the amount of $50.00, is under the column of "Rent". The exhibit itself says not. It shows it was cashed and not applied on the account.

Government's Exhibit 16 is dated October 1, 1946 in the sum of $200.00. This shows on his expense sheet under the column of "Rent", whereas the check shows it was cashed and not applied to any account.

These, ladies and gentlemen, are items that show the type of person with whom we are dealing. They show this man had something in mind, and one thing only—that was to wilfully and intentionally defraud the government out of it's just taxes.

No one likes to pay taxes. . . . at least I don't. . . . but we pay them. I doubt that any man can truthfully say that he likes to pay taxes, but we pay them and thank God that the government is in a position to protect us. They are high, but we pay them. Mr. Harris apparently does not believe in paying his fair share of the tax burden.

In reference to the number of character witnesses that Mr. Harris had, I would like to say in case you were

wondering why I asked the particular question I did, I only asked them if they knew anything about this case, and if they had heard any of the testimony. Apparently they did not.

You, ladies and gentlemen, have heard the testimony. You are the ones who can determine his character and his intentions and his wilfullness. Thes people were business associates of Mr. Harris apparently. I venture to say that if I were charged with some offense, either great or small, that my opponent here, Mr. Cunningham, would be willing to come in and state to you he thought I was personally of good character, as long as he didn't know anything about the facts and circumstances of the case.

I wonder what their testimony would have been if they had heard the testimony or had examined the books and records of this man. I am sure they would not have answered Mr. Cunningham's questions in the manner in which they did.

At this time Mr. Cunningham will have an opportunity to make his closing remarks to the jury, and then I will have additonal opportunity to answer some of the points he may make an issue of.

Thank you.

(Thereupon, counsel for the defendant made his closing statement to the jury.)

The Court:

Mr. Rosen.

Mr. Rosen:

If Your Honor please, ladies and gentlemen, one point I should like to get straight, and that is concerning Mr. Nisenson's file which Mr. Cunningham seems to make quite an issue of.

You will recall that in essence Mr. Nisenson's testimony was that in 1946 he had this conversation with Mr. Harris, and that subsequent to 1946 he identified this complete record book and the personal expense sheet that Mr. Zwick brought in. Now, I was a little surprised at Mr. Cunningham because he knows there are certain rules of law that apply as to each and every witness. One basic rule I think you probably all have observed is that the cross examination of a witness is more or less limited to what is brought out on direct examination. Now, if he wanted Mr. Nisenson to take the stand as his witness he knew that Mr. Nisenson was here in town and was available for subpoena on behalf of Mr. Cunningham, and he could have served him and brought him in as his own witness.

He didn't do that. There was no reason to go back to the 1929 tax returns, and we know there were no returns in the period between, and that is what you will find the report dealing with. They also dealt with other matters, and Mr. Cunningham is well aware that if he wanted Mr. Nisenson to testify about it he had every right in the world to serve him with a subpoena and have him tell you folks all about it.

Now, I will rebut a few of Mr. Cunningham's statements, and I wonder why he made them. Mr. Cunningham wasn't sworn as a witness in this case to testify about these matters. However, he says that Mr. Harris came down here and negotiated the Flamingo Hotel deal on behalf of the M. J. Harris Company. Who says that other than Mr. Cunningham—no one! Mr. Cunningham wasn't sworn as a witness, and I don't know from whom he gets his information, but it is certainly not in the record that Mr. Harris acted in behalf of the M. J. Harris Company.

Then Mr. Cunningham talks about concealment being the essence of a criminal tax case. Well, I think it goes

further than concealment. . . . it goes to fraud and concealment, or fraud or concealment, and I would like to go a little further, and the Court will probably instruct you on this, as to what is meant by "fraud and concealment". Any devious method used would be sufficient to raise the question of fraud. These duplicate records—is that fraudulent or it is not—where a man deducts $28,000 from his personal income tax return, and then deducts part of the same expenses from his corporate return. It that fraudulent or is it not fraudulent?

Mr. Cunningham says, "This is a case of revealment as opposed to a case of concealment." I say it was a very, very clever scheme by this defendant, Milton J. Harris, to evade his income tax. This return filed here shows $82,000 in expenses. . . .

Mr. Cunningham:

I will have to object to that. The corporate return doesn't say that.

The Court:

Deductions, he means.

Mr. Cunningham:

Carry forward loss.

The Court:

Carry forward loss, and the rest of it is expenses of various kinds.

Mr. Rosen:

There is close to $50,000 in expenses, and what he calls a "carry forward loss" of $35,951.13; and then the only item of income being the $45,000. It is very interesting what Mr. Cunningham says, that if the corporate return

did not include that then we would be here fighting over the corporate return.

The corporate return, for one thing, was not filed in Florida—it was filed in Cleveland, Ohio.

Second; where did the money go? Regardless of whether it was there correctly or not, we all know that if you take money out of a corporation either by way of salary, or by way of dividends, or by way of a bonus—regardless of how it comes out—if if goes into your pocket you must pay a tax on it.

Mr. Cunningham:

Object to that. That is not the law.

The Court:

It is substantially the law. I will instruct them as to the law.

Mr. Rosen:

I don't know what Mr. Cunningham has in mind unless he is contending it was a debt due the individual. You heard no evidence of any debt, did you? I am not saying it was improperly recorded necessarily, but this money never went into the corporation account. It never left the hands of Lawyers Title Company. It was put into the hands of the defendant for his personal home and had nothing to do with the corporation.

Mr. Cunningham also says that the defendant fully cooperated wih Mr. Nisenson and other Internal Revenue agents who conducted the investigation in this matter. I particularly recall Mr. Nisenson saying that he was given the complete books "as to one bank account", but Mr. Nisenson also said there were a number of other bank accounts and when he asked Mr. Harris about them he denied any knowledge of them until he was actually confronted with them.

Now, Mr. Cunningham is asking the jury to deal with possibilities. Ladies and gentlemen, anything is possible, but the Court I am sure will instruct you that you are not to concern yourself with possibilities. A lot of things can happen in this world that you might consider as absolutely impossible—what we are dealing with are probabilities. I think you, the jury, are more than adequately satisfied that Mr. Harris received this $45,000 personally, and basically what we want to know about is the wilfullness and intent.

One thing about intent you have to remember is that only God knows what a man has in his mind when he does something, and the only way we can determine his intent is by what he does. I ask you to look at what this man has done, and tell us whether he intended to defraud or not, and if this was wilfull. You look at the defendant's books, you look at the checks that he marked down on his expense book as "Rent" when they were not rent, but were cashed. You look at the sworn statement on his tax return that he filed a personal tax return in 1945, when he has actually never filed one since the early thirties. You look at this false statement where he says he was a resident of Puerto Rico. He goes on to say that he individually maintained these offices—not only did he want to get out of the $45,000 tax, but you will notice his tax returns show a loss of $4800 without the $45,000 tacked on here.

What about those expenses. Mr. Cunningham has said that we have not charged them to the defendant. It may not be charged but you consider those duplicate items and these checks which he has marked off as expenses. You consider those to determine what the man had in his mind, and that is how you will determine this man's intent.

Ladies and gentlemen, a corporate entity serves a very useful purpose in our way of business life. It is a necessary thing. The basic and primary thought behind a cor-

poration is more or less to limit a person's personal liability in connection with certain transactions—that is the main idea behind it. A person dealing with a corporation as a stockholder, director or officer, knows too that the biggest drawback to a corporation is the factor of being doubly taxed. The corporation pays a tax on the salaries and dividends it dispenses, and so does the individual on his income. That is the big argument against forming corporations.

This man has a law degree and has been in business all these years, and especially after being specifically told in June, 1946, that he must file a personal return to show all income he received through the corporation—does this all seem reasonable? He is not a stupid man—if he is stupid he is stupid like a fox. He knows what he is doing, and he has known all along what he is doing.

Now, the Court will instruct the jury, I am sure, in connection with arriving at a reasonable doubt. Unless you have an eye witness to a particular incident you cannot prove a case beyond a shadow of a doubt—that is impossible and the law does not require it. If you are satisfied to a moral certainty that the defendant did the things he is charged with doing you must find him guilty.

I ask you, ladies and gentlemen, to carefully consider all the evidence the government has produced. He has under-stated his personal tax return by $45,000 and that is shown, and the question is now whether he intended to do that. You look at those phony checks and at those phony expenses—checks payable to his stamp dealers—checks payable to his mother-in-law—items payable to his wife, and items charged to rent which were merely checks cashed for his own use; and I am sure you will come to the ultimate and unmistakeable dicision that this man is guilty as charged, and I ask you to return a verdict accordingly.

I thank you very much.

The Court:

Ladies and gentlemen, after the argument of counsel and after the evidence is all in it comes the duty of this Court to instruct you as to the law that you are to apply in your deliberations as respects your verdict in this case.

Milton J. Harris in this case is charged by the United States of America of having, on or about the 5th of March, 1947, wilfully and knowingly attempted to evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1946 by filing, or causing to be filed, with the Director of Internal Revenue, Jacksonville, Florida, a false and fraudulent income tax return wherein he stated that his net income for the calendar year, 1946 was not more than $4839.47, and that the amount of tax due and owing thereon was nothing, whereas as he then and there well knew his net income for said calendar year was $26,277.23, upon which the said net income he owed the United States of America an income tax of $9797.89.

Now, I call your attention to the fact that the charge is that he wilfully and knowingly filed this return knowing it to be false and fraudulent.

What has been said by the attorneys as regards the testimony, what it showed or what it did not show, or what has or may be said by me is not evidence. If you agree with the attorneys of course you may accept their version of it; but where they have stated something to be evidence and it is not evidence, or where they described the evidence and you did not agree, then you may ignore that entirely and should ignore it.

If I say something of what the evidence shows in my opinion, you should listen carefully, but if you do not agree with me you should accept your own version of it—you are the sole judges of the evidence.

Now, this is a criminal case, and I will first give you the general law in criminal cases.

You are the sole judges of the evidence, its weight and sufficiency, and the credibility of the witnesses. It is your duty to seek to reconcile the testimony of the witnesses as to make each witness speak the truth; but if after a full and fair consideration of all the testimony you find an irreconcilable conflict in the testimony, then you must determine what testimony is true, and reject such testimony as you disbelieve, and from the testimony you believe find your verdict.

In passing upon the credibility of a witness it is proper that you take into consideration the manner of the witness on the stand, his candor, or want of candor, his intelligence or otherwise, the reasonableness or unreasonableness of his statements, his interest if any he has, and all the circumstances surrounding such witness at the time of the giving of his testimony, and at the time of the happening of the event testified about.

The accused is always presumed to be innocent of the offense charged until his guilt has been established by proof beyond and to the exclusion of every reasonable doubt. This presumption abides with the defendant throughout every stage of the trial and continued to abide with him unless the government produces evidence to satisfy you of the guilt of the defendant beyond and to the exclusion of every reasonable doubt.

To overcome this presumption of innocence and to establish guilt, it is not sufficient for the United States to furnish a mere preponderance of evidence to prove a mere probability of guilt, but the proof of guilt must be to the exclusion of and beyond a reasonable doubt. The burden of such proof is on the government, and it is to the evidence introduced at the trial and to it alone that you are to look for such proof.

Now, the defendant has submitted certain instructions for the Court's consideration. Some I have rejected and some have been changed slightly, but I will read those instructions to you as they are in their final form. They are as follows:

The defendant in this case, as is true in all cases under the system of our government, comes into Court presumed to be innocent. This presumption of innocence accompanies and abides with him through every stage of the trial as to every material allegation of the indictment and until the exclusion of every reasonable doubt. I further charge you that even grounds of suspicion, guess or conjecture that the offense was committed and that the Defendant might be guilty, is not, of itself, sufficient to warrant his conviction of the offense charged.

We will go on to the next one; even though you may find that the Defendant reported less tax than he actually owed for the year charged, you still may not convict him of the offense for which he is indicted, unless you find that he did this wilfully.

Wilfully, as used in connection with this offense, means knowingly, and with a bad heart, and a bad intent; it means having the purpose to cheat or defraud or do a wrong in connection with a tax matter. It is not enough if all that is shown is that the defendant was stubborn or stupid, careless, negligent, or even grossly negligent. A defendant is not wilfully evading a tax if he is careless about keeping his books. He is not wilfully evading a tax if all that is shown is that he made errors of law. He is not wilfully evading a tax if all that is shown is that he in good faith acted contrary to the regulations laid down by the Bureau of Internal Revenue and the United States Department of the Treasury.

A transaction does not become unlawful simply because it is actuated by a desire to avoid taxation. Anyone may so arrange his affairs that his taxes will be as low as possible; he is not bound to choose that method which will best pay the treasury; there is not even a patriotic duty to increase one's taxes.

The law which covers the computation of income tax is intricate and complicated, and different accounting methods of treating various items raise problems of great complexity. Mistakes are numerous and it is not the purpose of the law to penalize frank differences of opinion as to the law, or innocent errors.

I charge you that in your consideration of the evidence in this case, you are not to be influenced by the fact that the Government of the United States is a party to this action, for I charge that the Government is to be considered as any other party and its counsel as any other counsel for any other party. In weighing the facts and evidence in this case, the Government and the Defendant are equal before the law. You are not also to attach any greater credence to the testimony of a Government witness because he is employed by, connected with, or called by the Government. You are not to give any greater weight to the testimony of a Government agent simply because he is employed by the Government, than you would the testimony of any other witness.

You are not required to accept, necessarily, the testimony or conclusions of any expere witness. The facts of this case are for your sole determination, and you may accept, reject or give to the testimony of any expert witness only such weight as you feel is proper.

The essence of this offense is fraud or concealment. It is not enough for the Government to show that this Defendant owed more tax than he paid for the year charged. Before you would be justified in returning a verdict of

guilty, you must find some positive act of fraud or concealment, such as, but not limited to, covering up sources of income, or some such similar positive act of concealment.

I instruct you that for tax purposes a corporation is an entity separate and apart from those who own it, even separate and apart from the sole stockholder.

The doctrine of corporate entity fills a useful purpose in business life, whether the purpose be to gain an advantage under the law of the state of incorporation, or to serve the creators personal or undisclosed convenience, so long as that purpose is the equivalent of business activities or is followed by the carrying on of business by the corporation, if, of course, it is a legitimate purpose.

The fact that a corporation is in liquidation does not relieve it from reporting any income which it receives during the year of liquidation.

You are instructed that if a man believes that income obligations are those of a corporation rather than those of himself, then even though he be entirely wrong, he would not be liable for omitting such income from his personal return.

Evidence of good character is proper and competent evidence and is to be considered by the jury along with all other evidence in the case. You are advised in this connection that the law assumes that one who has established, by his conduct in the community in which he has long resided, a reputation for integrity, is less likely to commit the offense charged than one who has not established such a reputation. Evidence of good character where relevant and material, as it is in this case, may of itself, be sufficient to create a reasonable doubt of the guilt of the accused even though without it the other evidence in the case might be convincing as to the Defendant's guilt, and if it does create such a reasonable doubt it is your duty to acquit the Defendant.

The Defendant has the absolute right not to testify, and you are instructed that his failure to testify is no evidence whatsoever from which you may infer his guilt, and you may not use this fact in determining his guilt or innocence.

Now, you will notice that in this case, as counsel have more or less stated in their arguments, the issue is whether or not this defendant concealed or attempted to conceal part of his personal income, and the part you are to consider is the $45,000 made on the hotel sale.

The government, as I understand their contentions, charge that this $45,000 commission was received by and accepted by the defendant directly from those persons who paid the commission, and there is evidence here to that effect.

The defendant apparently contends that the commission was earned by this real estate corporation in Cleveland, which corporation had a right to deal in real estate, and that it was reported on their return, which is evidenced by the return itself.

The government contends, however, as I understand it, that the corporation had a carry-over loss and if the commission was reported on that return that carry-over loss, plus certain expenses that they claim, would wipe out all tax liability. However, if the commission was received by the defendant it would, of course, not wipe out tax liability, but would impose substantial taxes on him.

In that connection I will give you further instructions, but generally speaking, a man who receives money from a corporation by way of salary, or by way of dividends, or by way of liquidating dividends, has to, under the law, report those receipts; and with the exception of liquidating dividends which are treated as capital gains under certain conditions and which are not important here, he has to pay taxes on the net amounts thus received.

In this case there is certain other evidence I want to comment on again. You recall in the charge here it is not charged that these $28,000 in deductions were false and fraudulent in this particular return. It is only charged he received $45,000 which he did not show in his personal return, and he is charged with wilfully failing to show that in his personal return, and that he did so wilfully in order to escape paying taxes.

There is certain evidence here which might indicate that certain expense items were juggled back and forth between the corporation and this individual, and there is other evidence he had received certain other income in other years which he had failed to make a return on. That evidence is admitted only for one purpose—along with the evidence about these checks cashed at the Shelborne Hotel—and that is; that it might indicate to you the frame of mind this defendant was in when he made this particular return. This would go to the question of intent and should be received for no other purpose.

The government is not contending those items were wrong, and it is not contending about the income tax for former years, and these other items are shown to you merely on the theory that they might indicate to you that this defendant had a bad intention in 1946, if you think the other items establish that he had not properly handled his tax matters in those other years. Don't consider them for any other purpose.

To establish its case the Government must prove beyond a reasonable doubt both of the following two elements; that substantial income tax was due and owing from the defendant in addition to that declared in his income tax return; and that the defendant wilfully attempted to evade and defeat such tax.

The gist of the offense charged in the indictment and each account thereof is a wilful attempt on the part of the

taxpayer to evade or defeat the tax imposed by the income tax law. The word "attempt" as used in this law, involves two things; one, an intent to evade or defeat the tax; and two, some act done in furtherance of such intent. The word "attempt" contemplates that the defendant had knowledge and understanding that during the year 1946 he had an income which was taxable and which he was required by the law to report, and that he attempted to evade or defeat the tax thereon, or a portion thereof, by purposely failing to report all the income which he knew he had during such calendar year and which he knew it was his duty to state in his return for such year.

There are various devices that may be resorted to to evade or defeat the tax. The one alleged here is that of filing false and fraudulent returns with the intent to defeat the tax or liability. The gist of the crime consists in wilfully attempting to escape the tax.

The attempt to evade and defeat the tax must be a wilful attempt; that is to say it must be made with the intent to keep from the government a tax imposed by the income tax laws which it was the duty of the defendant to pay to the government. The attempt must be wilful, intentionally done with the intent that the government should be defrauded of the income tax due from the defendant.

The word "wilful," as used in this statute means with a bad purpose, or without ground for believing that one's act is lawful, or with a careless disregard whether one has the right so to act. The word "wilful" as used in this statute, means with knowledge of one's obligation to pay the tax due, and with intent to defraud the government of that tax.

The question of intent is a matter for you, as jurors, to determine and, as intent is a state of mind and it is not possible to look into a man's mind to see what went on, the only way you have at arriving at the intent of the defend-

ant in this case is for you to take into consideration all the facts and circumstances shown by the evidence including the exhibits and determine from all such facts and circumstances what the intent of the defendant was at the time in question. Thus, direct proof of wilful or wrongful intent or knowledge is not necessary. Intent and knowledge may be inferred from acts and such inferences may arise from a combination of acts, although each act standing by itself may seem unimportant. These are questions of fact to be determined from all the circumstances.

In determining what the defendant's intent was you may take into consideration any evidence you find of the concealment of facts by the defendant, if any fact you find there is of such intent.

You are instructed that a man may not shut his eyes to obvious facts and say he does not know. He may not close his observation and knowledge of things that are out in the open and are obvious to him and say, "I have no knowledge of those facts." If a man honestly believes that he has paid all the taxes he owes, he is not guilty of criminal evasion. But if he acts without reasonable ground for belief that his conduct was lawful it is for you to decide whether he was acting in good faith or whether he intended to evade the tax. This question of intent is a question you must determine for yourselves from a consideration of all the evidence.

Now, in determining these elements of intent and wilfullness, and whether there was a tax owed, again the government must establish each one beyond and to the exclusion of every reasonable doubt, before you can convict the defendant in these cases.

There is a distinction between civil liability and criminal liability. This is a criminal case and the defendant is charged with the commission of a crime, and the fact he may have, or may not have, settled his civil liability for

taxes due to the government is not to be considered by you in determining the issues involved in this case; nor the fact, if it be a fact, that he has settled or has not settled taxes for any prior years is not to be considered by you in this case. Those matters are not before you, and jurors must not go beyond the case, because, after all, there may be evidence on both sides regarding that that you have not heard.

Consider the testimony you have heard from the witness stand and what is in these exhibits, and no other evidence, for the purpose of determining and arriving at your verdict in this case.

Now, "reasonable doubt", which I have mentioned several times, does not mean every possible doubt. Reasonable doubt means that kind of a doubt that would make a person hesitate to act rather than the kind of doubt on which he would be willing to act. If, after you have carefully considered and weighed all the evidence in the case proferred by both sides in the light of the law which the Court now gives you, you have a full, firm and abiding conviction to a moral certainty that the defendant is guilty as charged in the indictment, then his guilt has been established beyond a reasonable doubt. If, on the other hand, after you have carefully considered and weighed all the evidence in this case proferred by both sides in the light of the law which the Court now gives you, you do not have such a full, firm and abiding conviction to a moral certainty that the defendant is guilty as charged in the indictment, then his guilt has not been proven beyond a reasonable doubt.

Now, ladies and gentlemen of the jury, when you retire you will select one of your members as foreman, and that foreman will deal with the Court in all matters that may be dealt with during the time the verdict is under consideration.

You may take with you if you so desire, any and all exhibits introduced in this case, or you may ask for them and they will be brought to you.

Now, has counsel for either side noted any omissions in the instructions other than the ones we discussed?

Mr. Cunningham:

If the Court please.

The Court:

If you want to discuss the instructions we will send out the jury.

Mr. Cunningham:

(out of hearing of the jury). The thing I have reference to—it was stated that these are the defendant's requested instructions. They are those of the Court.

The Court:

I told them I had changed some of them and added to them.

Mr. Cunningham:

We will re-new our objections and take exception again to the requested instructions that were refused by the Court and to the deletions in the others.

I would also like to take exception to the statement the Court made about all sums received.

The Court:

I said by way of dividends, salaries, etc.

Mr. Cunningham:

We take exception to that. We don't think that is the law. They supplied us with a bill of particulars in which

they said they would show a real estate commission and they have never shown any of these other items. There is no proof or evidence that money received was not in re-payment of some kind.

The Court:

I will clear that up for you if you wish. I thought we had it clear.

Ladies and gentlemen, counsel and myself have discussed these instructions. I may not have made it clear, but the charge is that this defendant received $45,000 in commissions, and there is no charge that he received liquidating dividends, or dividends, or salaries of any sort—just the $45,000 commission.

Mr. Weinstein:

I wish you would instruct that all of the Court's instructions are of equal importance.

The Court:

Now, all of my instructions are of equal importance and please do not seize on any one and say that is it and we will travel on it. They are all to be taken as a whole and not singled out as you go along.

We have a form of verdict here, which, in this case, will be either guilty or innocent, as you see fit. You may now retire and consider your verdict.

Mr. Rosen:

I would like to substitute this photostatic copy for Government's Exhibit 1. Mr. Cunningham has stated he has no objection to the substitution.

Mr. Cunningham:

No objection.

The Court:
Motion to substitute is granted.

(Whereupon, at 4:10 p.m. o'clock, the Jury left the Courtroom.)

(At 5:30 p.m. o'clock, instructions were requested by the jury, and upon their return to the Courtroom the following proceedings were had:)

The Court:
Do you each waive polling of the jury and concede they are present?

Mr. Cunningham:
Yes, Your Honor.

Mr. Rosen:
Yes, sir.

The Court:
Very well. Let the record indicate that the defendant is present.
Now, ladies and gentlemen, I understand you have an inquiry to make.

The Foreman:
Judge, we have a question as to a verdict. Is it all right to ask this in open Court?

The Court:
Yes, and if I can answer it I will do so. If I cannot answer it I will tell you I cannot, and the reasons.

The Foreman:

We are in a quandary whether we must render a verdict of guilty with wilful intent, or whether or not we can render a verdict of guilty without wilful intent. Would you make that clear?

The Court:

If there is no wilful intent you cannot find him guilty. You can recommend as to sentence if you want to, but beyond that you cannot do anything.

The Foreman:

Thank you, Your Honor. You have answered our question.

(Thereupon, at 5:85 p.m. o'clock the jury retired to further consider of their verdict.)

In the District Court of the United States for the Southern District of Florida Miami Division.

Filed Miami Fla., Jun. 20, 1956. Julian Blake, Clerk.

United States of America, Plaintiff,
vs. No. 8441-M.Cr.
Milton J. Harris, Defendant.

Miami, Florida,
Tuesday, April 3, 1956.

(Appearances as Before)

(Counsel conceding that the defendant was present, and waiving polling of the jury, the following proceedings ings were had:)

The Court:

Mr. Foreman, do you have a question to address to the Court?

Foreman:

Your Honor, we have, sir.

The Court:

You may proceed.

Foreman:

No. 1. As corporation president, would the defendant have the right to use the $45,000 temporarily, as an individual, and then return it to the corporation? Then, if he did not have such a right, would he be required to report it as individual income?

No. 2. Would Your Honor please repeat the portion of the Charge that had to do with wilful intent, reasonable doubt, and credence of character witnesses—their testimony alone creating a reasonable doubt.

No. 3. Government's Exhibit No. 12, which I have here, next to the last page, there appears a notation: "Dissolved, August 15, 1946. All accumulated debts paid." And then there is a notation: "Income, October 15, Carl J. Fisher Corporation. Flamingo Hotel, $45,000." Inasmuch as the corporation had been dissolved, could the declaration of the $45,000 as corporation income and not as individual income to the defendant be considered wilful intent.

The Court:

All right. Let's take them one at a time. No. 1. You want to know—read it again.

Foreman:

As corporation president, would the defendant have the right to use the $45,000 temporarily as an individual, and then return it to the corporation. Then if he did not have such a right, would he be required to report it as individual income.

The Court:

The president of a corporation has no right to use corporate funds except with the consent of the so-called corporation, which then acts through its board of directors. It being a separate entity, he would have no right to use the other fellow's funds except with his consent. If you do use them, of course, he would have the right to recover them from you. In this case if the corporation gave him the right to use funds, he would be indebted to the corporation to that extent. There is no evidence one way or the other on that. The only evidence we have is what comes from the witness stand, and if he received funds from the corporation, either, as I told you, by way of dividends or by way of salary, either way, or by way of liquidated dividends, he would be required to report them on his income tax return just like he received funds from the corporation; he might have some funds that would be capital gain, but that is immaterial to the extent that it is not in this case. The only thing in this case is, did he receive this $45,000 as a gain. If he received it as a gain and the corporation didn't receive it, he would have to report it, of course. Do you understand that?

Foreman:

Yes, Your Honor.

The Court:

The question of what may have been—don't consider something that is not in evidence. A president has no right to take corporate funds. I can answer that, period, without the corporation's consent.

Foreman:

But controlling a corporation, and no evidence of the fact in the Minutes has been brought out, could we say, that being president of the corporation and controlling it that he could say, he meaning the defendant, who is also president of the corporation, "take it and use it."

The Court:

He could say that but there in no evidence in that respect, so you cannot conjecture. I told you not to decide on conjecture in this case. The only evidence you have on this case is that $45,000 was paid. Now, as I understand the case, the intent was that it should go into the corporation and they should pay the taxes on it, although he got it. As I see, the contentions in this case, and I could be mistaken, because you have heard the case and the evidence and you are the final judges of it—the contention is, although he received this $45,000 and used it for his personal business and did not count for it taxwise, that he claims he was laboring under the mistaken theory it should go into the corporation, and that he did not need to account for it taxwise.

Foreman:

Is it too late, Your Honor, to have the attorneys argue that point?

The Court:

Yes, it is too late now. They have already argued it to you. If you receive personal income you cannot have the corporation take care of it for you taxwise, but if you make a mistake, and you have that right, make an honest mistake, then you cannot be prosecuted criminally because of an honest mistake; and if you have any reasonable doubt as to whether he was laboring under some mistaken

or honest theory, then, of course, he would not be guilty; but you have all the evidence before you and you will have to determine that yourselves. My point is, there is no evidence here about loans, liquidating dividends, or even dividends, in this case.

Foreman:

I believe that answers question No. 1.

No. 2. Please repeat portion of Charge that has to do with wilful intent. Reasonable doubt and credence of character witnesses. Could their testimony alone create a reasonable doubt.

The Court:

Evidence of good character is proper, and has to be considered by the jury along with all other evidence in the case. You are advised in this connection that the law assumes that one who has established, by his conduct in the community in which he has long resided, a reputation for integrity, is less likely to commit the offense charged than one who has not established such a reputation. Evidence of good character, where relevant and material, as it is in this case, may, of itself, be sufficient to create a reasonable doubt of the guilt of the accused, even though without it the other evidence in the case might be convincing as to the defendant's guilt, and if it does create such a reasonable doubt it is your duty to acquit the defendant. In other words, it is sufficient sometimes to tilt the scales, but it is considered like any other evidence, along with all the other evidence, and it has no greater weight or less weight than any other evidence. To establish the case, the Government must prove beyond a reasonable doubt both the following two elements: (One, that substantial income tax was due and

owing to the plaintiff in addition to that declared in his income tax return. Two, that the defendant wilfully attempted to evade and defeat such taxes. The gist of the offense charged in the indictment is a wilful attempt on the part of the taxpayer to evade or defeat the tax imposed by the income tax law. The word "attempt," as used in this law, involves two things; one, an intent to evade or defeat the tax; and two, some act done in furtherance of such intent. The word "attempt" contemplates that the defendant had knowledge and understanding that during the year 1946 he had an income which was taxable and which he was required by the law to report, and that he attempted to evade or defeat the tax thereon, or a portion thereof, by purposely failing to report all the income which he knew he had during such calendar year and which he knew it was his duty to state in his return for such year.

There are various devices that may be resorted to to evade or defeat the tax. The one alleged in this indictment is that of filing false and fraudulent returns with the intent to defeat the tax or liability. The gist of the crime consists of wilfully attempting to escape the tax.

The attempt to evade and defeat the tax must be a wilful attempt, that is to say, it must be made with the intent to keep from the Government a tax imposed by the income tax laws which it was the duty of the defendant to pay to the Government. The attempt must be wilful, intentionally done, with the intent that the Government should be defrauded of the income tax due from the defendant.

"Wilful", as used in this statute, means with a bad purpose or without ground for believing that one's act is lawful, or with a careless disregard whether one has the right so to act.

The question of intent is a matter for you, as jurors, to determine, and, as intent is a state of mind and it is not possible to look into a man's mind to see what went on, the only way you have at arriving at the intent of the defendant in this case, is for you to take into consideration all the facts and circumstances shown by the evidence, including the exhibits, and determine from all such facts and circumstances, what the intent of the defendant was at the time in question; thus, direct proof of wilful or wrongful intent or knowledge is not necessary. Intent and knowledge may be inferred from acts and such inferences may arise from a combination of acts, although each act, standing by itself may seem unimportant. These are questions of fact to be determined from all circumstances.

You are instructed that a man may not shut his eyes to obvious facts and say he does not know. He may not close his observation and knowledge of things that are out in the open and are obvious to him and say, "I have no knowledge of those facts." If a man honestly believes that he has paid all the taxes he owes, he is not guilty of criminal evasion; but if he acts without reasonable grounds for belief that his conduct was lawful, it is for you to decide whether he was acting in good faith or whether he intended to evade the tax. This question of intent is a question you must determine for yourselves from a consideration of all the evidence.

Does that cover that?

Foreman:

I think so, Your Honor.

Mr. Cunningham:

There were the other definitions that you gave earlier in your Charge on wilfullness. I respectfully request that those be given.

The Court:

Do you want any further instructions?

Foreman:

No, sir; insofar as I think you have cleared up our question.

The Court:

It is the same thing, Mr. Cunningham, almost identically the same language.

Mr. Cunningham:

I have reference to Charges No. 3 and 10, both of which have to do with the matter of wilfullness, which the Court previously instructed the jury was the law.

The Court:

No. 3 I do not think is involved here. Wilfully, as used in connection with this offense, means knowingly and with a bad heart and a bad intent. It means having the purpose to cheat or defraud or do a wrong in connection with a tax matter. It is not enought if all that is shown is that the defendant was stubborn or stupid, careless, negligent, or even grossly negligent. A defendant is not wilfully evading a tax if he is careless about keeping his books. He is not wilfully evading a tax if all that is shown is that he made errors of law. He is not wilfully evading a tax if all that is shown is that he in good faith, acted contrarily to the regulations laid down by the Bureau of Internal Revenue and the United States Department of the Treasury. It is, however, a question of fact whether he knew that he had to pay a tax and whether he wilfully evaded it, and you have the evidence before you and you have to decide it upon the evidence and not upon speculation.

Foreman:

There is question No. 3, and I think you possibly covered that, Your Honor.

The Court:

It would be evidence bearing upon wilful intent if you find, beyond a reasonable doubt, that the defendant sought to shift his income to the corporation in order to avoid his personal tax obligation. On the other hand, the corporation is obligated, even though it is dissolved, for this tax, for everything that comes in during that tax year, including that which comes in after the dissolution, but which was earned prior to the dissolution. Is that clear to you?

Foreman:

Yes.

The Court:

As I have told you, if a man receives money from a corporation, he ought to show it in his income tax return, no matter what it might have been, except if it was a loan, but there is no evidence of loans, so don't let us get into those realms, if something might have happened, what could happen. Let us stick to the evidence. The Government says he received $45,000 personally. He says, "No, I received it, but it was properly returned by the corporation." That is about the beginning and end of this case, and you have to decide whether he received it. Apparently he did receive it, as far as I recall. There is no evidence to the contrary as far as I recall, and you have to decide whether he honestly believes the corporation accounted for it taxwise. Now, let me again caution you. Don't accept my version of the evidence unless you concur, in which case you are the final judges of the evi-

dence. You should listen to me; but you are not bound by my statement of the evidence You are bound by my statement of the law, and that goes for the attorneys, too. Now, do you have anything else?

Foreman:
No, sir; thank you very much.

The Court:
Counsel come up here if you want to discuss this.

(Out of hearing of the jury:)

Mr. Cunningham:
I think they asked for a Charge on reasonable doubt.

The Court:
Yes. I gave that.

Mr. Cunningham:
If the Court please, in connection with their questions about the receipt of money, there seems to be a strong opposition of minds.

The Court:
It seems to impress them greatly as to the fact that he used the money.

Mr. Cunningham:
But I don't think that is the controlling factor here. There is no evidence of a return of capital. It should be payment of a loan—repayment of a loan.

The Court:
We cannot go into surmise. There is no evidence.

Mr. Cunningham:

That's right, but I think it should be explained to this jury that there is no evidence that this is liquidated dividends.

The Court:

I have already stated that.

Mr. Cunningham:

The important thing, Your Honor, is that they are not to consider that at all because it would be somewhat speculation because there is no evidence.

The Court:

I told them that they are not to consider anything that there is no evidence about.

Mr. Cunningham:

You are going to re-read that last charge?

The Court:

Reasonable doubt; yes.

Mr. Cunningham:

The question as I understand it, Your Honor, it this, it is not whether he acted reasonably in connection with this but whether he in his mind believed it to be proper.

The Court:

I told them that twice or three times.

Mr. Rosen:

Do you want to re-argue this case?

Mr. Cunningham:

No.

The Court:

I think you are doing pretty well. You have been pretty well confused. They are now going into the realm of corporate actions and activities. I have emphasized the fact twice or three times in this re-hash, that what he believes is fundamental.

Mr. Cunningham:

We think that is right.

Mr. Rosen:

You said it too many times.

The Court:

It has been called to my attention that I did miss one of your requests and that was on reasonable doubt. I will give you that again.

Reasonable doubt does not mean every possible doubt. Reasonable doubt means that kind of a doubt that would make a person hesitate to act, rather than the kind of doubt on which he would be willing to act. If, after you have carefully considered and weighed all the evidence in the case proffered by both sides in the light of the law which the Court now gives you, you have a full, firm and abiding conviction to a moral certainty that the defendant is guilty as charged in the indictment, then his guilt has been established beyond a reasonable doubt. If, on the other hand, after you have carefully considered and weighed all the evidence in this case proffered by both sides in the light of the law which the Court now gives you, you do not have a full, firm and abiding conviction to a moral certainty that the defendant is guilty as charged in the indictment, then his guilt has not been proven beyond a reasonable doubt. I think that probably covers all of your inquires. If it does, you may now retire and further consider your verdict.

Mr. Cunningham:
Please note my exception to the charges.

The Court:
Yes.

(Thereupon the jury retired to consider their verdict at 10:15 A.M., and at 3:25 P.M. the jury returned to the Courtroom, whereupon, counsel conceding that the defendant was present, and waiving polling of the jury, the following proceedings were had:)

The Court:
Ladies and gentlemen of the jury, do you have a communication to the Court?

The Foreman:
Your Honor, one of our jurors has a question that he would like to have answered—a question that we cannot answer to his satisfaction.

The Court:
All right. Any objection to the jury asking a direct question?

Mr. Cunningham:
No objection, Your Honor.

Mr. Rosen:
The Government has no objection.

The Court:
All right.

Mr. Robbins (A member of the jury):

I am troubled. I am very badly troubled, and I would like help. The jury has almost made up its mind. I am not completely convinced of the intent of the defendant. I am convinced that the defendant owes the Government money. I feel as though there are some facts here that are missing. Since the Court admonished me that I must only judge it on what I see, and not to draw any inferences, I am trying to fill in these gaps and keep my mind completely free. I am trying to take the background of this defendant and I do not feel it has been criminal, and I don't honestly be made to serve a prison sentence and yet I do feel that he does owe the Government money. I am in a terrible state. I don't know what to do; and the entire jury says to me that I am the deciding factor here. Is it possible to disqualify myself? I don't know what to do.

The Court:

No; you sit down and let me speak to you.

Mr. Cunningham:

May I approach the bench, Your Honor?

The Court:

Yes.

(Out of hearing of the jury:)

Mr. Cunningham:

If the Court please, I think this jury has been concerned about the tax liability. I don't think it has been made clear to them that there is no question of him owing any money, and that is a matter to be taken up in another case, and the fact that he does or does not owe money is not of any concern.

The Court:
The only thing that concerns them is whether or not he made a false return.

Mr. Cunningham:
That's right.

The Court:
He may be obligated civilly and still not criminally.

Mr. Cunningham:
That's right.

The Court:
I was going to tell them that.

Mr. Cunningham:
I think they are concerned about that.

The Court:
A man may owe taxes and not be subject to criminal liability because he may not have wilfully attempted to evade the tax. The fact he has a civil liability for taxes does not necessarily mean he has a criminal liability. Is that clear to you on that one question?

Mr. Robbins:
Yes.

The Court:
Now, I said you can draw inferences but you cannot speculate as to what might have happened or could have happened. In other words, you are confined to the evidence, but whatever inferences the evidence warrants, you may draw, if you consider your experience in life and common sense, as they commonly call it, and then you

can take the evidence as you received it. Of course, you have no direct proof in this case. You seldom have it in tax cases, because that is what is in a man's mind.

In a large proportion of cases, absolute certainty cannot be expected. Although a verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, each juror must examine the question submitted with candor and with a proper regard and deference to the opinions of each other. You should listen to each other's arguments and views with a disposition to be convinced, as it is your duty to decide the case if you can conscientiously do so. No juror is expected to yield a conscientious conviction he may have upon the evidence, or upon any matter as he sees it. If, however, the larger number of jurors are for an acquittal or conviction, a dissenting juror should consider whether his doubt is a reasonable one when it has made no impression on the minds of other jurors equally honest and equally intelligent with himself. But again, if you have a conscientious conviction, you should not abandon your conviction just merely to please the other jurors.

Is there any other question? Is there any question that I have failed to answer?

Mr. Robbins:

No, Your Honor; but I would like to ask one more question, and that is, does the disposition of this case have anything to do with the Government's right to sue the man civilly?

The Court:

No; it has nothing to do with those rights theoretically. Naturally, it is going to bear on it to some degree. I don't know if there is any civil liability involved here myself. I don't know whether there are any claims pending. It

is immaterial. As I told you in my former instructions, don't let the civil liability have any effect upon you in this case one way or the other. The fact that he pays civilly has nothing to do with a criminal case. The fact that he doesn't have to pay civilly should have nothing to do with the case one way or the other. Remember what I said about "wilful." It is quite another thing. Do not mix them up, because that has nothing to do with the case. The case is, did he wilfully attempt to evade these taxes. That's all.

Mr. Robbins:

Will you please repeat the meaning of the term "wilful" once again.

The Court:

All right. To establish its case, the Government must prove beyond a reasonable doubt both of the following two elements: That substantial income tax was due and owing from the defendant in addition to that declared in his income tax return, and that the defendant wilfully attempted to evade and defeat such tax.

The gist of the offense charged in the indictment and each count thereof is a wilful attempt ton the part of the taxpayer to evade or defeat the tax imposed by the income tax law. The word "attempt," as used in this law, involves two things: One, an intent to evade or defeat the tax; and two, some act done in furtherance of such intent. The word "attempt" contemplates that the defendant had knowledge and understanding that during the year 1946 he had an income which was taxable and which he was required by the law to report, and that he attempted to evade or defeat the tax thereon, or a portion thereof, by purposely failing to report all the income which he knew he had during such calendar year, and which

he knew it was his duty to state in his return for such year.

There are various devices that may be resorted to to evade or defeat the tax. The one alleged here is that of filing false and fraudulent income tax returns with the intent to defeat the tax or liability. The gist of the crime consists in wilfully attempting to escape the tax.

The attempt to evade and defeat the tax must be a wilful attempt, that is to say, it must be made with the intent to keep from the Government a tax imposed by the income tax laws, which it was the duty of the defendant to pay the Government: The attempt must be wilful, intentionally done, with the intent that the Government should be defrauded of the income tax due from the defendant.

The word "wilful", as used in this statute, means with a bad purpose, or without grounds for believing that one's act is lawful, or with a careless disregard whether one has the right so to act. The word "wilful." as used in this statute, means with knowledge of one's obligation to pay the tax due, and with intent to defraud the Government of that tax.

The question of intent is a matter for you, as jurors, to determine, and as intent is a state of mind, and it is not possible to look into a man's mind to see what went on, the only way you have at arriving at the intent of the defendant in this case is for you to take into consideration all the facts and circumstances shown by the evidence, including the exhibits, and to determine, from all such facts and circumstances, what the intent of the defendant was at the time in question. Thus, direct proof of wilful or wrong intent or knowledge is not necessary. Intent and knowledge may be inferred from acts and such inferences may arise from a combination of acts, although each act, standing by itself, may seem unimportant. These are

questions of fact to be determined from all the circumstances.

You are instructed that a man may not shut his eyes to obvious facts and say he does not know. He may not close his observation and knowledge of things that are out in the open and are obvious to him and say, "I have no knowledge of those facts." If a man honestly believes that he has paid all the taxes he owes, he is not guilty of criminal evasion, but if he acts without reasonable grounds for belief that his conduct was lawful, it is for you to decide whether he was acting in good faith or whether he intended to evade the tax. This question of intent is a question you must determine for yourselves from a consideration of all the evidence.

Now, as I told you before, it is not enough if all that is shown is that the defendant was stubborn or stupid, careless, negligent, or even grossly negligent, a defendant is not wilfully evading a tax if he is careless about keeping his books. He is not wilfully evading a tax if all that is shown is that he made errors of law. He is not wilfully evading a tax if all that is shown that he, in good faith, acted contrary to the regulations laid down by the Bureau of Internal Revenue and the United States Department of the Treasury. But, as I have stated before, he cannot shut his eyes and do something wrong, and say, "I am not guilty for that reason," but if he merely believes that what he is doing is right, that is not wilful, even though he may be mistaken.

Mr. Robbins:

May I have your indulgence for one more moment. On the personal tax return that the defendant submitted, there was a question that he answered in which he said—the question was, "When was the last year that you submitted a tax return?" The answer was, "1945." The evi-

dence brought out shows that there was no tax return submitted in 1945. On examining that fact, that there was a false statement made, but there is nothing apparent to be gained by making that false statement, would that nevertheless indicate an intent?

The Court:

It could. It might possibly; but it has no bearing on the direct question in this case as to whether he made a false return to evade taxes. That is what we are trying. It could, if you chose to consider it as such, be some evidene of intent on his part to make a misleading or false return. I would say offhand that it is rather unimportant. If it has any evidentiary effect, it is small.

(Out of hearing of the jury:)

Mr. Rosen:

The question concerning a prison term was brought out by this juror, and I was wondering if an instruction from the Court that they are not concerned with that—that is strictly the province of the Court:

Mr. Cunningham:

I must take exception to that because a reduced sentence might reasonably be indicated, and I think personally—

The Court:

Don't worry about that. Unfortunately, it seems to have that effect.

Mr. Cunningham:

I wanted to take exception to that, Your Honor. A person might be found guilty and will have no tax liabil-

ity. The question at this time is that at the time of the filing of this return he was attempting to evade and defeat the taxes. The matter of his liability civilly is not bearing upon the consideration of this jury.

The Court:

I told them that.

Mr. Cunningham:

You did; but the statement you made that if he was found criminally liable it would have a bearing on it—

The Court:

I will explain it, if you want to.

Mr. Cunningham:

I think it should be explained, that that has no bearing on it whatsoever. They have been concerned with that all along, and we didn't grasp it earlier enough

The Court:

Ladies and gentlemen of the jury, let me again repeat the fact that the defendant may or may not have a civil liability for taxes, and that has nothing to do with this case—the fact that the defendant may or may not have a civil liability for taxes has nothing to do with this case. The only question before you is, did he wilfully attempt to evade his proper tax for the year 1946 by the filing of a false return. It is just that narrow and that is all there is to it. The other matters will be left to the operation of the law, which is not essential to this case. You may now retire and consider your verdict.

(Thereupon the jury retired from the Courtroom at 3:44 P.M., after which the following proceedings were had:)

Mr. Cunningham:

This juror that just talked to Your Honor seemed to be greatly concerned about the statement in the income tax return for 1946 relative to the filing of an individual return for the prior year. During the course of the trial we submitted that the filing for prior years had no particular relevancy and we don't think it is relevant even so far as intent is concerned, and we respectfully request the Court to open the evidence again so we can introduce one document, to-wit, the individual's personal return that he filed in Puerto Rico with respect to the calendar year 1945.

The Court:

He said he filed this in Cleveland.

Mr. Cunningham:

It seems that the jury is misinformed here as to some misinterpretation, and I think in the interest of justice we ought to have an opportunity to have the 1945 Puerto Rico return presented to them so that they will know that a return for 1945 was filed. They seem to be greatly impressed by that one statement in the return.

The Court:

I told them that I considered it of very little consequence. I think it would be of some consequence if he didn't file one in Cleveland.

Mr. Rosen:

I think it is of major consequence if he didn't filed that return.

Mr Cunningham:

I think in the interest of justice that should be called to their attention. I can produce the return in about three minutes.

The Court:

I do not feel that we should open up the case on that score.

Mr. Cunningham:

It was pointed out in the testimony that he was in Puerto Rico in the year 1945.

The Court:

I think they apparently understand that I consider it of little consequence. I cannot strike evidence that I have admitted. I can certainly depreciate it to the lowest edge, which I did in this case.

Mr. Rosen:

And which I did not appreciate.

Mr. Cunningham:

I don't think it has any relevancy. He didn't even reside here in 1945.

The Court:

He said he filed one in Cleveland in 1945, which he did not do.

Mr. Cunningham:

He did file the M. J. Harris Company.

The Court:

Yes; but that is the whole point.

Mr. Cunningham:

He did file a return in Cleveland in 1945, and they have the impression he filed no return.

The Court:

No; they have the return he filed in Cleveland for Harris Company. You argued it.

Mr. Cunningham:

I ask to be permitted to introduce to them the 1945 return.

The Court:

I deny the motion because I do not want to reopen this case. I don't want to deny any rights, but if it has any evidentiary value it is very slight, in my opinion.

Mr. Cunningham:

Your Honor, if it was known he did file an individual return in Puerto Rico in 1945—

The Court:

I am not too sure that that would help. It might.

Mr. Cunningham:

I think it would, since it seems to be an important problem to them.

The Court:

Only to this one man. I have told them all, forget about anything but this one thing, did he fail to return moneys received by him in 1946. I think it is of slight value, in my opinion.

Mr Cunningham:

I would like to have the opportunity to eliminate that slightness, Your Honor.

The Court:

I still think it has slight value.

Mr. Cunningham:
If it does I would like to have an opportunity of showing this other document.

The Court:
I am sorry, Mr. Cunningham, but I don't think we should open up the case for that particular matter.

(At 3:59 P.M. the jury returned to the Coutroom, and counsel conceding that the defendant was present, and waiving polling of the jury, the following proceedings were had:)

The Court;
Ladies and gentlemen of the jury, have you arrived at a verdict?

The Foreman:
Your Honor, we have.

The Court:
Will you hand the verdict to the Clerk, please?

(Verdict handed to the Clerk, who handed same to the Court.)

The Court:
Mr. Clerk, will you read the verdict?

The Clerk:
Will the jury please stand.

"In the United States District Court in and for the Southern District of Florida, Miami Division, No. 8441-M-Criminal. United States of America versus Milton J

Harris. Verdict. Miami, Florida, 4-3-56. We, the jury find the defendant guilty as charged, with a strong recommendation for clemency. So say we all. James D. Trahey, Foreman."

The Court:
Do you desire the jury to be polled?

Mr. Cunningham:
I believe we should have the jury polled.

The Court:
All right. Poll the jury, Mr. Clerk.

(Thereupon the jury was polled, each juror answering in the affirmative.")

The Court:
Are you satisfied with the poll, counsel?

Mr. Cunningham:
Yes, Your Honor. Thank you.

The Court:
All right. The jury will be excused from further consideration of this case. The verdict will be filed.

(Discussion off the record.)

The Court:
All right, Mr. Harris. Come forward, please.

Mr. Cunningham:
I would like to request that his bond be continued.

The Court:

Milton J. Harris, you have been found guilty of the charges contained in the indictment filed against you in Case No. 8441-M-Criminal, pending in this Court and the Court adjudges you guilty of those charges. Sentence is deferred and the matter is referred to the Probation Officer of this Court for pre-sentence investigation. Your bond will be continued in full force and effect when and if the bonding company acting through its attorney in fact, agrees to remain obligated upon that bond to insure your presence at the date and time of sentencing.

(Thereupon, after a discussion off the record, the trial was concluded.)

VERDICT OF THE JURY, filed April 3, 1956, in words and figures as follows:

(Title Omitted.)

Miami, Florida,
Date: 4-3-56.

We, the jury, find the defendant, Guilty as charged with a strong recommendation for clemency.

So Say We All.

JAMES D. TRAHEY,
Foreman".

JUDGMENT AND SENTENCE ON THE VERDICT filed April 20, 1956, in words and figures as follows:

United States District Court for the Southern District of Florida.

Filed Miami, Fla. Apr. 20, 1956. Julian A. Blake, Clerk.

United States of America,

vs. No. 8441-M-Cr.

Milton J. Harris.

On this 20th day of April, 1956 came the attorney for the government and the defendant appeared in person with counsel A. B. Cunningham, Esq.

It Is Adjudged that the defendant has been convicted upon a verdict of guilty of the offense of did knowingly and willfully attempt to evade a large part of the Income Tax due and owing by him to the United States of America for the calendar year 1946. 26 USC 145 (9b) as charged in the Indictment and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of six (6) months.

It Is Further Ordered that the defendant pay unto the the United States of America a fine in the sum of $2000.00

and upon default of payment of said fine that he stand committed to the County Jail of Dade County until the payment of said fine or until discharged by due process of law. Defendant is hereby given 12 months to pay said fine.

Defendant to remain at liberty on bond until 12:00 Noon of April 24, 1956.

It Is Ordered that the Clerk deliver a certified copy of this judgment and committment to the United States Marshal or other qualified officer and that the copy serve as the committment of the defendant.

EMETT C. CHOATE,
United States District Judge.

MOTION FOR NEW TRIAL, filed April 20, 1956, in words and figures as follows:

(Title Omitted.)

Comes Now, the Defendant, Milton J. Harris, by and through his undersigned attorneys, pursuant to the order of the Court made in open Court on Wednesday, April 4, 1956, and respectfully moves this Honorable Court to set aside the verdict heretofore rendered in this cause, and enter a judgment notwithstanding the verdict, or in the alternative, to grant the Defendant a new trial, and as grounds therefor, respectfully shows to the Court as follows:

1. The verdict is contrary to law.

2. The verdict is contrary to the weight of the evidence.

3. The verdict is contrary to the law and the evidence.

4. The evidence is so uncertain and inadequate that it does not support the verdict.

5. The Court erred in denying Defendant's motion to quash the subpoena duces tecum served upon the Defendant to produce certain books and records.

6. The Court erred in admitting into evidence over objection of Defendant, Government's Exhibits No. 7, 8 and 10.

7. The Court erred in admitting into evidence over objection of Defendant Government's Exhibit No. 9.

8. The Court erred in admitting into evidence over objection of Defendant Government's Exhibits No. 11 and 12.

9. The Court erred in permitting Government's Witness, Morris Nisenson, to testify over the objection of Defendant, that the Defendant had not filed individual income tax returns in the years prior to the year charged.

10. The Court erred in permitting Government's Witness, Morris Nisenson, to testify over objection of Defendant, as to the names of certain rare stamp dealers.

11. The Court erred in permitting Government's Witness, Morris Nisenson, to testify over objection of Defendant, relative to the admission of Government's Exhibit No. 11.

12. The Court erred in permitting Government's Witness, Morris Nisenson, to testify over objection of Defendant, relative to the admission of Government's Exhibit No. 12.

13. The Court erred in permitting Government's Witness, Morris Nisenson, to testify over objection of Defendant, as to the identity of H. Barber.

14. The Court erred in permitting Government's Witness, Mehrling, to testify over objection of Defendant, relative to the expenses on Defendant's 1946 individual income tax return, and to testify as to his comparison of such expenses with those shown on the 1946 income tax return of the M. J. Harris Company, Inc. (Government's Exhibits No. 1 and 2, together with Government's Exhibits No. 11 and 12.).

15. The Court erred in permitting Government's proof to go beyond the Bill of Particulars over the objection of Defendant.

16. The Court erred in refusing to grant Defendant's motion for judgment of acquittal made at the close of Government's evidence.

17. The Court erred in refusing to admit into evidence Defendant's Exhibits No. 3, 9, and 11 for identification.

18. The Court erred in denying Defendant's motion to strike Government's Exhibits No. 7, 8, 9, and 11.

19. The Court erred in denying Defendant's motion to strike the testimony of Government's Witnesses, Mehrling and Nisenson.

20. The Court erred in denying Defendant's motion for judgment of acquittal made at the close of all of the evidence.

21. The Court erred in refusing to give Defendant's Requested Instructions No. 2, 4, 5, 8, 9, 12, 13, 14, 15 and 18.

22. The Court erred in refusing to give Defendant's Requested Instructions No. 4 and 10, in the form in which requested.

23. The Court erred in informing the jury that they might recommend as to sentence at a time when the jury had asked for further instructions on willfulness.

24. The Court erred in charging the jury, in substance, that it is for you, as jurors, to determine from all of the facts whether the Defendant acted reasonably and that a man might not shut his eyes and say I do not know.

25. The Court erred in failing sufficiently to distinguish, for the benefit of the jury, the distinction between civil and criminal tax liability.

26. The Court erred in instructing the jury that monies received from a corporation might be liquidated dividends, salary, or return of capital.

27. The Court erred in giving improper instructions on the matter of willfulness.

28. The Court erred in denying Defendant's motion to re-open the evidence in the light of one of the inquiries by the jury.

BLACKWELL, WALKER & GRAY,
Attorneys for Defendant,
First Federal Buliding,
Miami, Florida.

CLAUDE PEPPER LAW OFFICES,
Attorneys for Defendant,
37 N. E. First Avenue,
Miami, Florida.

By ARTHUR B. CUNNINGHAM,
(Arthur B. Cunningham).

It Is Hereby Certified that a true and correct copy of the above and foregoing Motion for New Trial, was personally delivered to the Honorable James L. Guilmartin, United States Attorney, Federal Building, Miami, Florida, this 19th day of April, 1956.

ARTHUR B. CUNNINGHAM.

DEFENDANT'S REQUESTED INSTRUCTIONS filed April 2, 1956, numbering 1-18 inclusive, in words and figures as follows:

(Title Omitted.)

Defendant's Requested Instruction No. 1.

The Defendant in this case, as is true in all cases under the system of our Government, comes into Court presumed

to be innocent. This presumption of innocence accompanies and abides with him through every stage of the trial as to every material allegation of the indictment and until the minds of the jury are convinced by the evidence beyond and to the exclusion of every reasonable doubt. I further charge you that even grounds of suspicion, guess or conjecture that the offense was committed and that the Defendant might be guilty, is not, of itself, sufficient to warrant his conviction of the offense charged.

E.C.C. Given.

Refused.

Defendant's Requested Instruction No. 2

The Defendant in this case cannot be found guilty simply because he may have failed to include in his income tax return, items of income or sources of income that should have been included; he can only be found guilty in the event that he wilfully and knowingly undertook to evade the tax as charged in this indictment.

Hargrove v. United States, 67 F. 2d 820 (C.A. 5 1923), Paschen v. United States, 152 F. 2d 593 (C.A. 9 1945).

Given.

E.C.C. Refused, covered by gen. Instr.

Covered by 3.

Defendant's Requested Instruction No. 3.

Gentlemen, even though you may find that the Defendant reported less tax than he actually owed for the year

charged, you still may not convict him of the offense for which he is indicted, unless you find that he did this wilfully.

Wilfully, as used in connection with this offense, means knowingly, and with a bad heart, and a bad intent; it means having the purpose to cheat or defraud or do a wrong in connection with a tax matter. It is not enough if all that is shown is that the defendant was stubborn or stupid, careless, negligent, or even grossly negligent. A defendant is not wilfully evading a tax if he is careless about keeping his books. He is not wilfully evading a tax if all that is shown is that he made errors of law. He is not wilfully evading a tax if all that is shown is that he in good faith acted contrary to the regulations laid down by the Bureau of Internal Revenue and the United States Department of the Treasury. He certainly is not wilful if he acts without the advice of a lawyer or accountant; for there is no requirement that a taxpayer, no matter how large his income, should engage a lawyer or an accountant.

(Adapted from charge approved in Gaunt v. United States, 184 F. 2d 284; in substance given by Choate, D.J., in United States v. Bernstein, 8850-M-Cr.

E.C.C. Given as corrected.

Refused.

Defendant's Requested Instruction No. 4.

Gentlemen of the Jury, you are instructed that tax avoidance is proper and legal. A transaction does not become unlawful simply because it is actuated by a desire

to avoid taxation. Anyone may so arrange his affairs that his taxes will be as low as possible; he is not bound to choose that method which will best pay the treasury; there is not even a patriotic duty to increase one's taxes.

The law which covers the computation of income tax is intricate and complicated, and different accounting methods of treating various items raise problems of great complexity. Mistakes are numerous and it is not the purpose of the law to penalize frank differences of opinion as to the law, or innocent errors.

Therefore, even though you may find that the Defendant did not pay all of his proper taxes for the year involved, and even though you find that certain actions of the Defendant were motivated by a desire to reduce his taxes, you would not be authorized to convict him unless you also find that these acts were done wilfully and with specific intent to cheat, defraud, mislead or conceal.

(Adapted in part from charge given by Choate, D.J., in United States v. Bernstein, 8850-M. Cr., and in part from the language of Learned Hand, C.J., in Helvering v. Gregory 69 F. 2d 809, (C.A. 2 1934).

E.C.C. Given as corrected.

Refused.

Other cov. 3.

Defendant's Requested Instruction No. 5.

I charge you, Gentlemen, that this Defendant is charged with a wilful evasion of tax. Willfulness must be proved

beyond a reasonable doubt before you would be authorized in convicting this Defendant.

Willfulness can best be described as a state of mind of the taxpayer where he is fully aware of the existence of the obligation which he then seeks to conceal. Willful evasion of a tax requires an intentional act or omission as compared with an accidental or inadvertent one. It also requires a specific wrongful intent to conceal an obligation known to exist; as compared to a genuine misunderstanding of what the law requires of a bona fide belief that a certain item should have been reported in some other income tax return than that of the taxpayer.

United States v. Martell, 199 F. 2d 670 (C. A. 3 1952).

Given.

ECC. Refused covered by Ctr. Instr.

last cov 3

Defendant's Requested Instruction No. 6.

Gentlemen of the Jury, I charge you that in your consideration of the evidence in this case, you are not to be influenced by the fact that the Government of the United States is a party to this action, for I charge that the Government is to be considered as any other party and its counsel as any other counsel for any other party. In weighing the facts and evidence in this case, the Government and the Defendant are equal before the law. You are not to attach any greater credence to the testimony of a Government witness because he is employed by, connected with, or called by the Government. You are not

to give any greater weight to the testimony of a Government agent simply because he is employed by the Government, than you would the testimony of any other witness.

(Adapted from charge given by Choate, D.J., in United States v. Bernstein, 8850-M.Cr.)

E.C.C. Given.

Refused.

Defendant's Requested Instruction No. 7.

Gentlemen, you are not required to accept, necessarily, the testimony or conclusions of any expert witness. The facts of this case are for your sole determination, and you may accept, reject or give to the testimony of any expert witness only such weight as you feel is proper.

E.C.C. Given.

Refused.

Defendant's Requested Instruction No. 8.

Gentlemen, when you retire to the Jury Room to consider your verdict, it will be proper for you to discuss the evidence and to express to each other your views of the case. But, the evidence must be such as to convince each and every individual juror of the guilt of the accused before you can arrive at a verdict of guilty. It is your duty and the duty of each one of you not to yield your own conscientious convictions produced by the evidence to the views of your fellow jurors simply for the purpose

of reaching a verdict or being in harmony. Before the Defendant can be convicted, he is entitled to have the deliberate judgment of twelve men. Each juror must be able to say "I am satisfied from the evidence beyond a reasonable doubt as to the guilt of the Defendant." Therefore, if any one of you has a reasonable doubt as to the guilt of the Defendant, you should not yield that doubt simply for the purpose of reaching a verdict.

Smith v. State, 48 Fla. 307, 37 So. 573.

Given.

E.C.C. Refused, (argumentative).

Defendant's Requested Instruction No. 9.

This is a criminal case. The Defendant, Milton J. Harris, is accused of a crime. I instruct you that the outcome of this case in no way whatever affects the Defendant's Civil liability for any taxes which he may or may not subsequently be found to owe.

E.C.C. Given.

ECC Refused, covered in gen.

Defendant's Requested Instruction No. 10.

The essence of this offense is fraud or concealment. It is not enough for the Government to show that this Defendant owed more tax than he paid for the year charged. Before you would be justified in returning a verdict of guilty, you must find some positive act of fraud or concealment, such as, but not limited to, keeping a double

set of books, dealing in cash, concealment of assets, or covering, covering up sources of income, or some such similar positive act of concealment.

If in your opinion as jurors, the evidence shows that this Defendant revealed to the Government by means of the income tax return of the M. J. Harris Company or otherwise, the existence of the commission payment which the Government contends should be included in his income tax return, or only that the total effect of the Defendant's conduct did not amount to any positive act of concealment, then your verdict should be not guilty.

Spies v. United States, 317 U. S. 492, United States v. Cole, 90 F. Supp. 147 (D.C. Cal. 1950).

E.C.C. Given as corrected.

Refused.

Defendant's Requested Instruction No. 11.

Gentlemen of the Jury, I instruct you that for tax purposes a corporation is an entity separate and apart from those who own it, even separate and apart from the sole stockholder.

The doctrine of corporate entity fills a useful purpose in business life, whether the purpose be to gain an advantage under the law of the state of incorporation, or to serve the creators personal or undisclosed convenience, so long as that purpose is the equivalent of business activities or is followed by the carrying on of business by the corporation.

(here insert new 13)

The corporation is a separate taxable entity. Moline Properties, Inc. v. Commissioner, 319 U. S. 436, 63 S. Ct. 1132 (1942) (An appeal originating in the United States District Court at Miami).

E.C.C. Given.

Refused.

Defendant's Requested Instruction No. 12.

In determining whether any transaction is taxable to a corporation, you are entitled to consider whether or not the transaction was of the type commonly carried on by the corporation or done by the corporation in the past, as well as such factors as the length of time that the corporation was organized, whether the corporation carried on the usual activities of corporations such as filing of capital stock reports, the maintaining of minutes, and the election of officers, and whether or not the corporation had, in the past, a real business purpose.

Mertens Law of Federal Income Taxation (new edition) Section 17.05.

Given.

E.C.C. Refused, confusing.

Defendant's Requested Instruction No. 13.

Gentlemen of the Jury, I instruct you that when and if a commission is payable to a corporation in liquidation, then where such case exists the income constitutes taxable income to such corporation rather than to its sole

stockholder, where, prior to the date of the actual dissolution of the corporation, the corporation has performed all of the services required to earn the commissions. In such a circumstance, the income must and should be reported by the corporation rather than the individual.

United States Treasury Department Revenue Ruling 255 of 1953. Jud Plumbing Inc. v. Commissioner, 5 TC 127 affd., 153 F. 2d 681 (C.A. 5 1946), Floyd v. Schoffield, 193 F. 2d 594 (C.A. 5 1952).

ECC. Given.

ECC. Refused, as not going far enough.

The fact that a corporation is in liquidation does not relieve it from reporting any income which it receives during the year of liquidation.

Defendant's Requested Instruction No. 14.

Gentlemen, if after considering all of the foregoing matters, you find that the commission payment in the amount of $45,000 properly should have been included on the income tax return of the M. J. Harris Company, Inc., or, even if you should find that this Defendant only thought that they should have been placed on this return, provided you should find that his belief was real, it is your duty to acquit the Defendant.

If the standard to be applied is not what an expert would believe, or even what a reasonable man might believe, it is what this Defendant himself actually did

believe, and if you find that his belief is sincere, you should acquit the Defendant.

Given.

ECC Refused, does not cover subject.

You are instructed that if a man believes that income obligations are those of a corporation rather than those of himself, then even though he be entirely wrong, he would not be liable for omitting such income from his personal return.

E.C.C.

Defendant's Requested Instruction No. 15.

Gentlemen of the Jury, if you find that the Defendant, Milton J. Harris, has made no attempt to conceal his activities, and during the course of this investigation, made every effort to facilitate the agents of the Internal Revenue Service in ascertaining facts, the presumption would be that tax evasion has not been wilfully attempted and such presumption must be dispelled by clear and convincing evidence in order to authorize conviction.

What this means, Gentlemen, is that if you find that the Defendant fully cooperated with the Internal Revenue agents during the investigation of this case, this in and of itself may be sufficient to raise in your minds a reasonable doubt as to the guilt of the Defendant and if such reasonable doubt is raised, then, of course, it is your duty to return a verdict of not guilty.

Berkovitz v. United States, 213 F. 2d 468 (C.A. 5 1954).

Given.

ECC Refused.

Defendant's Requested Instruction No. 16.

In this case, Gentlemen of the Jury, certain testimony has been introduced with reference to the good character of the Defendant. You are instructed that evidence of good character proven in a case is evidence in favor of the Defendant possessing it. It goes to augment the presumption of innocence which the law raises in behalf of the Defendant. The Defendant is presumed to be innocent, and is therefore presumed to have ordinary good character. Here however, the Defendant has strenghtened that evidence of good character and the presumption of innocence by the testimony of persons who know him, and who reside in the vicinity in which he lives, that he is a person who has a general reputation of good character. Evidence of good character is proper and competent evidence and is to be considered by the jury along with all other evidence in the case. You are advised in this connection that the law assumes that one who has established, by his conduct in the community in which he has long resided, a reputation for good character and honesty and integrity, is less likely to commit the offense charged than one who has not establshed such a reputation. Evidence of good character where relevant and material, as it is in this case, may, of itself, be sufficient to create a reasonable doubt of the guilt of the accused even though without it the other evidence in the case might be convincing as to the Defendant's guilt, and if it does create

such a reasonable doubt, it is your duty to acquit the Defendant. (Hawley v. United States, 133 F.2d 966 (C.A. 10.).)

ECC Given as corrected.

Refused.

Defendant's Requested Instruction No. 17.

Gentlemen, the Defendant has an absolute right not to testify, and you are instructed that his failure to testify is no evidence whatsoever from which you may infer his guilt, and you may not use this fact in determining his guilt or innocence.

ECC Given.

Refused.

Defendant's Requested Instruction No. 18.

A reasonable doubt, Gentlemen, is that sort of doubt which would make a reasonable man hesitate to act—in the more important affairs of his life.

Given.

ECC Refused.

NOTICE OF APPEAL filed April 23, 1956, in words and figures as follows:

In the United States District Court for the Southern District of Florida, Miami Division.

United States of America, Plaintiff,
vs. No. 8441-M-Cr.
Milton J. Harris, Defendant.

Name and address of appellant:
Milton J. Harris,
2675 Flamingo Drive,
Miami Beach, Florida.

Name and address of appellant's attorneys:
Claude Pepper Law Offices,
37 N. E. First Avenue,
Miami 32, Florida.

Offense:

The appellant, after trial before Honorable Emett C. Choate, District Judge, and a jury of twelve, was convicted of a violation of former § 145(b) of the Internal Revenue Code (26 U.S.C. § 145(b)—income tax evasion.

The Honorable Emett C. Choate, Judge of the United States District Court in and for the Southern District of Florida, did, after denying the defendant's Motion for a New Trial filed pursuant to a previous order of the Court, on April 20, 1956, adjudge the defendant guilty as charged and convicted and did adjudge that the defendant be committed to the custody of the Attorney General of the United States for a period of six (6) months and did adjudge a fine against defendant in the sum of Two Thousand Dollars ($2,000.00).

The defendant is presently at liberty upon an appeal bond set by the trial Judge.

The Defendant Hereby Takes an Appeal from the above judgment to the United States Court of Appeals for the Fifth Circuit.

Done this 23rd day of April, 1956.

CLAUDE PEPPER LAW OFFICES.

37 N. E. First Avenue,
Miami 32, Florida.

By ARTHUR B. CUNNINGHAM,
Attorneys for Appellant-Defendant.

Certificate of Service.

I Arthur B. Cunningham, of counsel for appellant-defendant taking the above appeal, hereby certify that a true copy of this Notice of Appeal has been this day served upon the Honorable James C. Guilmartin, United States Attorney for the Southern District of Florida.

This 23rd day of April, 1956.

ARTHUR B. CUNNINGHAM.

ORDER DENYING MOTION FOR NEW TRIAL entered April 23, 1956, in words and figures as follows:

(Title Omitted.)

This Cause came on to be heard this day upon the Defendant's Motion for New Trial, and/or judgment notwithstanding the verdict, and the Court, after hearing the statements of counsel, and being otherwise fully advised in the premises it is hereby

Ordered and Adjudged that the Defendant's Renewed E.C.C. Motion for New Trial and judgment notwithstanding the verdict, is and the same shall hereby be denied in each aspect thereof.

Done and Ordered in Chambers at Miami, Dade County, Florida, this 23 day of April, 1956.

EMETT C. CHOATE,
United States District Judge.

ORDER EXTENDING TIME FOR DOCKETING RECORD ON APPEAL filed April 23, 1956, in the words and figures as follows:

(Title Omitted.)

This Cause coming on to be heard on the Motion of the Defendant-Appellant for an order extending the time within which to docket the record on appeal with the Clerk of the Court of Appeals for the Fifth Circuit, and the Court having been shown good cause therefor, it is

Ordered that the time within which the Defendant-Appellant may docket the said record with the Court of

Appeals is, and the same shall be hereby extended to and including the 30th day of July, 1956.

Done and Ordered in Chambers at Miami, Dade County, Florida, this 22 day of May, 1956.

EMETT C. CHOATE,
United States District Judge.

DESIGNATION OF CONTENTS OF RECORD ON APPEAL, filed July 17, 1956, in words and figures as follows:

(Title Omitted.)

Pursuant to the Federal Rules of Criminal Procedure the defendant-appellant hereby designates for inclusion in the Record on appeal to the United States Court of Appeals for the Fifth Circuit, taken by Notice of Appeal filed the 23rd day of April, 1956, the following portions of the Record, proceedings, evidence, and exhibits as filed:

1. The Indictment filed February 27, 1953.

2. Motion for Bill of Particulars and supporting affidavit filed March 25, 1953.

3. Order Granting Bill of Particulars dated March 16, 1955.

4. Motion Requiring Government to file Bill of Particulars filed March 16, 1955

5. Order Requiring Government to file Bill of Particualrs dated November 10 1955.

6. Bill of Particulars filed December 5, 1955.

7. Notice of Trial, setting trial for March 12, 1956.

8. Motion for Continuance and supporting affidavit.

9. Order Denying Motion for Continuance dated February 29, 1956.

10. Subpoena Duces Tecum dated March 14, 1956, served on defendant upon the application of the Government.

11. Motion to Quash Subpoena Duces Tecum filed March 22, 1956.

12. Order Denying Motion to Quash Subpoena Duces Tecum dated March 23, 1956.

13. The entire stenographic transcript of the minutes of the trial prepared by the Court Reporter (two volumes).

14. Verdict of the Jury dated April 3, 1956.

15. Judgment and Sentence on the Verdict dated April 20, 1956.

16. Motion for New Trial filed April 20, 1956.

17. All of defendant-appellant's requested instructions.

18. The original Government's exhibits numbered 1-16, inclusive.

19. All of defendant-appellant's original exhibits numbered 1, 2, 4, 10 and 12.

20. All of defendant-appellant's exhibits for identification numbered 3, 5, 6, 7, 8, 9 and 11.

21. Notice of Appeal filed April 23, 1956.

22. Order Denying Motion for New Trial dated April 23, 1956.

23. Order Extending Time for Docketing Record on Appeal dated May 22, 1956.

24. This Designation of Contents of Record on Appeal.

ARTHUR B. CUNNINGHAM,
(Arthur B. Cunningham),
Attorney for Defendant-
Appellant.

37 N. E. First Avenue,
Miami, Florida.

It Is Hereby Certified that a true and correct copy of the foregoing Designation of Contents of Record on Appeal was mailed to Honorable James L. Guilmartin, United States Attorney, Post Office Building, Miami, Florida, this 17th day of July, 1956.

ARTHUR B. CUNNINGHAM.

ORDER FOR TRANSMISSION OF ORIGINAL EXHIBITS, entered July 17, 1956, in words and figures as follows:

(Title Omitted.)

This Day this cause coming on to be heard upon the oral application of counsel for Defendant-Appellant for an order for the transmission of certain original exhibits, and it appearing to the Court that said exhibits are difficult and expensive to copy and reproduce, it is hereby

Ordered, and Adjudged that the Clerk of this Court transmt to the Unted States Court of Appeals for the Fifth Circuit the originals of the following exhibits:

1. The original exhibits of the plaintiff-appellee numbered 1-16, inclusive.

2. The original exhibits of the defendant-appellant numbered 1, 2, 4, 10 and 12;

3. The original exhibits of the defendant-appellant numbered for identification 3, 5, 6, 7, 8, 9 and 11.

Done and Ordered in Chambers at Miami, Florida, this 17th day of July, 1956.

(S.) EMETT C. CHOATE,
United States District Judge

United States of America,
Southern District of Florida.

I, JULIAN A. BLAKE, Clerk of the United States District Court in and for the Southern District of Florida, and as the legal custodian of the records and files of the said Court, do hereby certify that the foregoing pages numbering 1-262, inclusive, contain a true, full and complete copy of all such portions of the Record, proceedings and evidence in the cause styled United States of America v. Milton G. Harris, No. 8441 Miami Criminal as appear upon the records and files of my office that have been designated by written directions of the Appellant to be included in this record on appeal.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said Court at Miami, Florida, on this 23rd day of July, 1956.

JULIAN A. BLAKE,
as Clerk of the U. S. District
Court in and for the Southern
District of Florida.
By EARLE F. SPRIGG,
(Seal) Chief Deputy Clerk.

That thereafter the following proceedings were had in the said United States Court of Appeals for the Fifth Circuit, viz: -

ARGUMENT AND SUBMISSION

Extract from the Minutes of March 12, 1957

MILTON J. HARRIS,

No. 16074. versus

UNITED STATES OF AMERICA.

- - - -

On this day this cause was called and, after argument by Arthur B. Cunningham, Esq., for appellant, and E. David Rosen, Esq., Assistant United States Attorney, for appellee, was submitted to the Court.

* * * * * *

OPINION OF THE COURT FILED - APRIL 9, 1957.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16074

MILTON J. HARRIS,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(April 9, 1957.)

Before TUTTLE, JONES and BROWN, Circuit Judges.

TUTTLE, Circuit Judge: This is an appeal from a judgment of guilty and sentence following a jury verdict finding that the appellant "did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1946 . . . .".

The principal ground of appellant's appeal is the admission by the trial court, over objection, of evidence

tending to show that certain deductions claimed by the taxpayer were duplicated as deductions claimed by his wholly owned corporation after the Government had, by its bill of particulars, indicated that the prosecution was based solely on the failure of the taxpayer to include a single $45,000 item of income. There are other contentions as to alleged improper admission of evidence as to prior years and incorrect charge to and comments to the jury.

Soon after the indictment was returned the appellant filed his motion for a bill of particulars which the trial court granted in part.[1] It is apparent that the defendant

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[1] In view of the great stock appellant takes in the matter of the Bill of Particulars, it is necessary to point out precisely what he requested by way of particulars and what the court directed the Government to furnish.

The motion asked for particulars as follows:

"1. The nature or kind of each item and the amount of each claimed by the Government as making up the total gross income claimed by the Government to have been received by the Defendant in the year 1946.

"2. The type and amount of each deduction against the total gross income of the defendant for the year 1946, allowed in computing the alleged net income of defendant for said year;

"3. The type and amount of each deduction by defendant in his income-tax return for the year 1946, which has been disallowed in computing the alleged net income of defendant for said year;

"4. Whether it is claimed that defendant wilfully withheld or omitted from his income-tax for the year 1946, item and amount of income, and if so, the nature and kind and the amount of each claim.

"5. Whether it is claimed that defendant wilfully and knowingly deducted from his gross income for the year 1946, items which were not legally deductible, and if so, the nature and kind of such illegal deductions and amount of each such item."

The court granted the motion as to the following:

"2. That motion of defendant for bill of particulars is hereby granted, and the plaintiff, United States of America, shall submit to the defendant particulars in the following form and the substance:

asked for and got an order requiring particulars as to the items making up the gross income and of deductions allowed or disallowed *in determining the net income which is charged against the defendant.* The court refused to require any answer from the Government as to "whether it is claimed that defendant wilfully and knowingly deducted from his gross income for the year 1946 items which were not legally deductible, and if so the nature or kinds of such items."[2]

During the course of the trial there was evidence that amply authorized the jury to find that Harris individually earned and collected in 1946 a $45,000 real estate commission and that he did not include it on his personal income tax return for that year filed in Miami, Florida. The Government then produced evidence to the effect that this amount was reported on the tax return of the M. J. Harris Company, a Cleveland, Ohio corporation, which had a net loss for the year of over $39,000 (including loss carryovers from 1944 and 1945), after including the item of $45,000. It thus became apparent that if the $45,000 item

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"(a) The general category and amount in each general category making the gross income alleged to have been received by the defendant for the calendar year 1946;

"(b) The general category and amounts allowed or disallowed by the Government *in determining the net income which is charged against the defendant.* Included in this shall be personal expenses allowed or disallowed, stated in a general category." (Emphasis added.)

[2] The Government's response to the motion was in the following terms:

"Answering Paragraph 2 of the order as follows:

"(a) Net Gain from the Sale of Capital Assets	$23,168.83
Insurance Agency Fees	710.98
Real Estate Commissions	45,000.00
(b) Operating Expenses Allowed Per Return	28,714.28
Contributions, Real Estate & Sales Taxes Allowed	814.01"

was truly income to Harris he would profit by returning it as income to the corporation, because on account of the claimed loss position of the corporation it would owe no tax on it at all.

In order to prove the element of wilfulness which is an ingredient of the offense charged, the Government undertook to prove several things that were calculated to show that this was not a mere unintentional mistake by Harris. That it was such a mistake, of course, however much it benefitted him taxwise, would be a defense to the criminal proceedings if believed by the jury. It is the offer and admission of this proof that is the basis of appellant's principal attack here.

The first serious objection on the trial came when the Government sought to prove, as it did, that of the $28,714.28 of deductions claimed by Harris on his personal return, $17,605.16 of them were also claimed by the M. J. Harris Company as deductions for the same calendar year. This was proved by an analysis of Harris' personal expense sheet and of the company's expense sheet. Identical expenditures were found to have been entered on both records and were taken as deductions in the returns signed by him in one instance as an individual and in the other as president of the corporation.

The defendant vigorously assailed the action of the trial court in permitting any mention to be made of "deductions." He contended that the Government's bill of particulars admitted the deductibility of the $28,714.28

and that it would be improper for the court to permit the Government in any way to attack the validity or bona fides of a single dollar of the expenditures comprising this sum.

Upon the Governments representation that it proposed to show double deductions—once by Harris individually and once by his corporation—the court admitted the evidence solely as proof of the taxpayer's intent to defraud.

The court cautioned the jury on several different occasions that this evidence was not to be considered by them as proof of the correct amount of taxable income, but was admitted only as a circumstance to show Harris' intent in attributing the $45,000 income item to the corporation.

There is no merit in the appellant's criticism of the action of the trial court in this respect. In the first place it is to be noted that the court declined to require an answer to defendant's inquiry whether he wilfully and knowingly deducted items which were not legally deductible, but only required, as to deductions, that the Government show the amount of deductions allowed or disallowed in computing the net *income* of the taxpayer. This circumstance, of itself, was ample notice to defendant that the Government would not be precluded from attacking the defendant's alleged practice of taking the same deduction twice. This, of course, could only be shown by proof of the deductions taken, which proof the defendant objected to. Moreover, if the bill of particulars had not been

granted as to only a part of the inquiries made by the defendant we are satisfied that there is no rule of law that would have prevented the Government from showing, if it could, that some of the deductions were of a highly suspicious nature, not in an effort to increase the deficiency in the tax, but to show the defendant's knowledge and thus his intent as to what he was doing when he incorrectly attributed the income item to that taxpayer which had an excess of deductions over income. There is nothing in the case of *Bryan v. United States* (5 Cir.), 175 F. 2d 223, or the case of *United States v. Neff* (3 Cir.), 212 F. 2d 297, relied on by appellant, contrary to what we hold here.

The Government also tendered, and appellant objected to the introduction, of testimony in the form of a statement signed by the appellant following a question and answer session with a special agent. This evidence included statements that the accused had not filed any personal income tax returns since "the thirties" because, as he stated, he had been advised by the revenue agent that if he operated all his business and paid all his personal expenses through a corporation he need file only a corporation return. The statement also included an explanation by Harris of why he split a certain payment into five parts and opened five separate bank accounts, and also an explanation that he guessed he had failed to report a large payment "because I was up to my neck in marital troubles and stayed away from Cleveland and my records." Other evidence objected to included testimony by the agent that

Harris had told him this story and that he had advised Harris as to the true requirements.[3]

There was also testimony objected to by appellant to the effect that substantial disbursements, carried as deductions from income, represented payments to Harris' wife and mother-in-law and some represented payments to rare stamp dealers.

We think the court properly admitted all of this evidence for the purpose of showing the defendant's knowledge as to his obligation to return and his wilfulness in evading this obligation and pay income taxes. In view of his statement that he had a corporation that paid his personal expenses but that he nevertheless made no personal return, it was certainly competent for the Government to show the personal nature of some of the payments made

[3] The testimony showing that Harris had not filed any personal returns and that he was advised with respect to the need to file a personal return showing personal income follows:

"A. He [Harris] stated that his returns had been examined some time in the early thirties by an examiner whose name he couldn't recall, and who he could not identify in any way, and that he had been told inasmuch as he was operating his business through a corporation and he was the sole owner of the corporation that it would not be necessary for him to file personal income tax returns inasmuch as the corporation also paid all his personal expenses, and so he discontinued filing Form 1040, the individual tax return.

"Q. Did you have any further discussion concerning furnishing tax returns?

"A. Yes, I told him that whoever had told him that had obviously misinformed him, and that even though he operated as a corporation that corporation was separate and distinct from himself as an individual, that it was required of him that he file personal income tax returns, and anything the corporation disbursed for his benefit, or to him, or for him, was income to him personally and should be reported by him on an individual income tax return."

In a signed statement defendant answered agent's question as follows:

"Q. Were you aware it was taxable income?

"A. I never even thought of it. I made up my own income tax."

by him to demonstrate how fantastic his claimed understanding of the law really was. Moreover, his personal return which is the basis of the indictment carried the statement that he had filed a return for the year 1945. The Government, of course, should be permitted to prove this statement to be false by showing that he had filed no personal return for 1943, 1944 or 1945, which proof defendant also objected to.

There is no merit in the appellant's criticism of the admission of the signed statement on the ground that it contained hearsay. An admission signed by the accused that is relevant to the issue being tried is, of course, an exception to the hearsay rule. While cautioning lower courts that such admissions, if a critical part of the Government's case, must be corroborated to be admissible, the Supreme Court has expressly held them admissible as an exception to the hearsay rule:

> " . . . . Admissions, retold at a trial, are much like hearsay, that is, statements not made at the pending trial. They had neither the compulsion of the oath nor the test of cross-examination. They are competent as an admission against interest."
>
> *Opper v. United States*, 348 U.S. 84 at 90.

See also *Monroe v. United States* (5 Cir.), 215 F. 2d 81, cert. denied, 348 U.S. 914, where we stated at page 83:

> "Admissions which are voluntarily made without any false promises or inducements are competent evidence against one charged with crime. In re White, D.C., 98 F. Supp. 985."

The fact that the questions put by the revenue agent embodied statements of fact does not make the questions inadmissible, since they were made to the accused and he responded to them. Neither, of course, is there any basis for appellant's objection to the agent's testifying on the trial itself as to conversations with the accused regarding his failure to file returns for prior years. It was clearly possible for the jury to infer from the fact that Harris had stated he paid all his personal expenses out of his corporation and that he refrained from filing personal returns not because he had no taxable income, but because he didn't think he had to, that he had sufficient income during the prior years to require the filing of a personal return. Especially is this true in light of the statement that he "was making $4200 every two weeks for five weeks and I opened up a new account in five different banks because I knew each account was insured up to $5000. Then when I got the Sylvania money *I took enough* to make each of the accounts $5,000 and left the balance in the Cleveland Trust." (Emphasis added.)

It also appears on his corporate records that he paid alimony of at least $500 in 1943 and of $2400 in 1945, which he charged to fees and salaries.

All in all there is ample evidence from the statements made by the accused to the agents and from his own personal and corporate records that for the years 1943 through 1945 Harris had sufficient personal income to require him to make a personal income tax return for those years, and the proof that he did not do so is relevant and admissible to show his knowledge of his obligation and

his intent to defraud the Government in defeating and evading it. We will not review at length the rule of law which permits the introduction of such evidence in a case in which intent is an ingredient of the offense charged. In *Lloyd v. United States* (5 Cir.), 226 F. 2d 9, we reaffirmed the expression of the doctrine as set forth in the opinion on motion for rehearing in *Weiss v. United States* (5 Cir.), 122 F. 2d 675, 682, 689, where we said:

> "Let us consider the theory upon which such evidence is admissible. The general rule is that evidence of another crime unconnected with the one on trial is inadmissible, but this rule is subject to a number of exceptions, the first of which is that evidence of other offenses by the accused is admissible to show his criminal intent as to the offence charged, where the other offenses are similar to and not too remote from that charged, and where intent is in issue as an element of the offense charged, where the other offenses are evidence of a separate crime tends to explain, illustrate, or characterize the act charged when such act is capable of more than one construction. Another is to rebut a claim of mistake or inadvertence. An exception also applies where the crime charged is one of a series of swindles or other crimes involving a fraudulent intent, or where the crime charged is part of a plan or system of criminal action. It is clearly admissible in prosecutions for obtaining money by false pretenses. The length of time over which an inquiry as to other offenses may extend is within the sound discretion of the trial court."

We think there is no merit in the appellant's criticism of comments made by the trial judge to the jury on the two occasions on which the jury requested additional instructions. From the court's charge as a whole and in the admonition that there could be no conviction without a finding of wilful intent, we think the jury was properly and correctly advised on the function of the jury and also as to the meaning of "wilful" as used in the statute and the indictment. The voluntary addition by the court to a supplemental instruction of the statement "You can recommend as to sentence if you want to, but beyond that you cannot do anything," was not, under the circumstances of the trial, including the charge and the supplemental discussion, calculated to induce a verdict of guilty. Cf. *Forster v. United States* (5 Cir.), 237 F. 2d 617. Moreover appellant's counsel made no objection to this comment by the court. In fact, on a reappearance of the jury seeking additional instructions when Government counsel suggested to the court that it admonish the jury that the matter of sentence was completely out of their hands, appellant's counsel objected and the court left the matter without further instructions.

If the defendant's counsel had any specific objection to the charge as to wilfulness as given it was not called to the court's attention on any of the several occasions afforded them by the court to perfect the charge. The charge as given was fair and clear and contained no prejudicial error.

The remaining points made by appellant here are, we think, not sufficiently significant to merit separate treatment. They have each been carefully considered and are rejected.

The judgment is AFFIRMED.

J U D G M E N T

Extract from the Minutes of April 9, 1957.

MILTON J. HARRIS,

No. 16074. versus

UNITED STATES OF AMERICA.

This cause came on to be heard on the tranacript of the record from the United States District Court for the Southern District of Florida, and was argued by counse;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

* * * * *

PETITION FOR REHEARING FILED - APRIL 29, 1957.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 16,074

MILTON J. HARRIS,

Appellant,

-vs-

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION

PETITION FOR REHEARING
BRIEF IN SUPPORT
MOTION TO CORRECT RECORD

PETITION FOR REHEARING

Part I.

Comes now the appellant, and in accordance with Rule 29 of the Rules of this Court petitions for a rehear-

ing of this cause, and as grounds therefor assigns the following:

1. The Court erred in holding that the order of the trial court granting a bill of particulars "was ample notice to the defendant" that the government would not be precluded from attacking deductions (Opinion, p. 5). Appellant submits that the Court overlooked and failed to consider that the deception upon the appellant was wrought by the bill of particulars itself, without reference to the order granting it.

2. The Court overlooked and failed to consider the actions of the government in using the bill of particulars as a technical device for deceiving and surprising appellant and his counsel at the trial of this cause.

3. The Court's holding that even had the bill of particulars been granted as to all of the inquiries made by appellant, the government still could have shown that the deductions were "of a highly suspicious nature" in order to prove intent, is necessarily in conflict with the cases of *Bryan v. United States*, 175 F. 2d 223 (C.A. 5, 1949), and *United States v. Neff*, 212 F. 2d 297 (C. A. 3, 1954).

In so holding this Honorable Court has overlooked and failed to consider that the elements which are necessary for the proof of a charge of tax fraud are so intertwined that it may not fairly be said that a specific quantum of proof shows only intent and not income. Therefore, the Court overlooked and failed to consider that when appellant was advised that his deductions would be allowed, that he was entitled to assume that they would be allowed for *all* purposes, in the absence of a statement of limitations in the bill.

4. This Court erred in making the following finding:

> "If the defendant's counsel had any specific objection to the charge as to wilfulness as given it was not called to the court's attention on any of the several occasions afforded them by the court to perfect the charge." (Opinion, p. 11)

This finding overlooks and fails to consider the full and complete objections to the court's instructions on wilfulness made at the time prior to the oral arguments, when the trial court first indicated what his charge on wilfulness would be.[1]

5. In holding that the quoted language does not constitute adequate objection, the Court is in conflict with the case of *United States v. Kelinson*, 205 F. 2d 600 (C.A. 2, 1953), wherein it was said:

> "The objections previously made amply sufficed to make known to the judge that these defendants would assert that he had erred. Fed. Rules

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[1] "Mr. Weinstein:
We have to make certain objections; first, to the language of the last three paragraphs. I think it would be prejudicial because the jury would think you were referring to the existence of a scheme, subterfuge and device in this case here. We feel that language would be highly prejudicial.
The Court:
Suppose we say, 'There are various schemes that may be resorted to . . . '?
Mr. Weinstein:
I think even the word 'scheme' is prejudicial. Can we change that to 'way' or 'method'?
The Court:
Suppose we say, 'various devices'.
Mr. Weinstein:
Of course, we make a general objection to it. We say it doesn't specifically differentiate between tax avoidance and tax evasion." (R. 159-160) (emphasis supplied)

Crim. Proc. Rule 30, 18 U.S.C., does not require a lawyer to become a chattering magpie." 205 F. 2d 600, 601-602.

6. The Court overlooked and failed to consider that the trial court's sua sponte remarks relative to recommending as to sentence *actually* induced a verdict with such a recommendation. The Court erred in holding that any objection or exception to such remarks was necessary. The Court's opinion in this regard is necessarily in conflict with *Demetree v. United States*, 207 F. 2d 892 (C.A. 5, 1953), and *Smith v. United States*, 230 F. 2d 935 (C.A. 6, 1956).

7. This Court overlooked and failed to consider the true import in holding of *Forster v. United States*, 237 F. 2d 617 (C.A. 9, 1956) (Opinion, p. 11). Appellant submits that this case is not authority for the proposition for which it was cited by the Court, but, instead, supports the proposition that the instructions on wilfulness given by the trial court, and objected to by appellant's counsel, were, in fact, erroneous and prejudicial.

Part II.

8. Comes again the appellant and in the interest of justice petitions the Court to consider and grant a rehearing in this cause upon the following specified error:

The trial court erred in denying appellant's motion to dismiss the indictment (R. 6).

The reason this Honorable Court should exercise its discretionary powers now to consider such specification of error and grant a rehearing in this cause is that the

indictment herein was filed after the expiration of the statute of limitations applicable to such indictment, and that unless rehearing is granted, the appellant herein will be improperly and illegally sentenced.

BRIEF IN SUPPORT OF GROUND 8.

The indictment herein (R. 1) charges the appellant with a violation of § 145(b), Internal Revenue Code of 1939, which provides as follows:

> "§ 145. Penalties
>
> (b) Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

At the time the appellant was indicted, the same Internal Revenue Code of 1939 contained Section 3616(a), which provided as follows:

> "§ 3616. Penalties
>
> Whenever any person—
>
> (a) False returns. Delivers or discloses to the collector or deputy any false or fraudulent

> list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made;
>
> * * * * *
>
> he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

It is contended to this Court that the offense for which the appellant was indicted may not constitute any greater offense than that proscribed by § 3616(a), above quoted. The reasons appellant so contends are as follows:

Offense for which appellant was indicted can be no more than a misdemeanor.

1. (a) It is obvious from a reading of the two statutes above cited that, insofar as an attempt to defeat and evade taxes may be made by the filing of a false and fraudulent return, both § 145(b) and 3616(a), Internal Revenue Code of 1939, cover the same ground. In such a case common sense would dictate that there could be no legal distinction between the acts outlawed by the two statutes in cases where the act of evasion charged is that of filing a false and fraudulent return. This has been squarely held by the majority opinion of the Supreme Court in *Berra v. United States*, 351 U.S. 131, wherein it was said:

> "For here the method of evasion charged was the filing of a false return, and it is apparent that the facts necessary to prove that petitioner

> 'willfully' attempted to evade taxes by filing a false return (§ 145(b)) were identical with those required to prove that he delivered a false return with 'intent' to evade taxes (§ 3616(a)). In this instance § 145(b) and 3616(a) covered precisely the same ground."

Therefore, it is clear that the double jeopardy clause would prevent the appellant from being thus sentenced under both of these sections on account of committing a single act of filing a false return: *Pereira v. United States*, 347 U.S. 1.

(b) But if the appellant could not be punished under both statutes for the same act of filing a false and fraudlent return, then obviously he must be punished under only one or the other.

The government has long contended that it may choose under which of the statutes above set forth it may prosecute any particular act of evasion, in spite of the wide disparity between the maximum penalties provided in each of them. Appellant here contends that it is unlawful and unconstitutional in the absence of a specific statute, to delegate to United States attorneys the discretion as to under which statute an offender may be prosecuted.

The Supreme Court has held that different penalties may be imposed under State statutes for the same offense, *only* where the statute creates a reasonable classification for offenders, and deals out the same penalties to all who are similarly situated; and if the statute for a classification is unreasonable or arbitrary, the statute is unconstitutional. *Skinner v. Oklahoma*, 316 U.S. 535.

The Internal Revenue Code contains no criterion whatsoever for the classification of those who file false or fraudulent returns, and no check on the use of the government's discretion, whether exercised arbitrarily or not. State statutes attempting to give a prosecutor such discretion have been held invalid. See e.g. *State v. Pirkey*, 203 Oregon 697, 281 Pac. 2d 698.

(c) It is contended, then, that the government's heretofore exercised discretion to punish those accused of filing false returns, either under the felony or misdemeanor provisions of the Internal Revenue Code of 1939 amounts to a denial of due process of law and an invalid delegation of the power of Congress.

Appellant's argument in this regard is summed up by the dissenting opinion of Mr. Justice Black in *Berra v. United States*, supra.

> "The Government's whole argument rests on the stark premise that Congress has left to the district attorney or the Attorney General the power to say whether the judge and jury must punish identical conduct as a felony or as a misdemeanor.
>
> A basic principle of our criminal law is that the Government only prosecutes people for crimes under statutes passed by Congress which fairly and clearly define the conduct made criminal and the punishment which can be administered. This basic principle is flouted if either of these statutes can be selected as the controlling law at the whim of the prosecuting attorney or the Attorney General * * *

A congressional delegation of such vast power to the prosecuting department would raise serious constitutional questions." 351 U.S. 139, 140.

(d). If, then, the government cannot constitutionally elect to prosecute identical offenses under two different statutes, there are only two apparent results: First, that both statutes are void, and secondly, that in punishing the specific act of filing a false and fraudulent return, only the lesser penalty may apply. The second solution appears to be more practical and consistent with legislative intent and public policy. This would be in accordance with the holding of the Supreme Court in *Bell v. United States*, 349 U.S. 81, 83, wherein the court said:

"It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment."

2. It is the general law that a specific statutory provision dealing with a particular subject always should be applicable in preference to a general statutory provision. *United States v. Chase*, 135 U.S. 255, 260; *Kepner v. United States*, 195 U.S. 100, 125; *Robinson v. United States*, 142 F. 2d 431. Thus, in the *Robinson* case, supra, the Court of Appeals for the Eighth Circuit, said:

"Although the larceny of any property of the United States in general may be punished by ten years imprisonment, it is forbidden to impose more than three years for larceny of that particular United States property which belongs to

> the Post Office Department. Elementally, the special stands against the general. That is, where there is a law against any stealing, and another and different law against stealing some particular thing, the two laws do not invalidate each other by conflict, but the courts treat the law against stealing the particular thing as presenting an exception to the law against stealing things in general. They enforce the exception." 142 F. 2d 432.

In the case at bar it is clear that § 145(b), Internal Revenue Code 1939, stands in the position of a general statute, and § 3616(a), Internal Revenue Code 1939, is a specific statute, dealing with a particular act, i.e., filing a false and fraudulent return. It is, therefore, contended that in line with the above and foregoing authority, only the special statute, 3616(a), may apply, and the specific offense for which the appellant was indicted may not be more than the misdemeanor defined in said section.

3. On March 29, 1957, subsequent to the preparation and printing of appellant's original brief in this cause, the Supreme Court of the United States granted certiorari in the case of *Costello v. United States*, Docket No. 666, 25 L.W. 3222; and subsequently, on March 5, 1957, in the case of *Achilli v. United States*, Docket No. 430, 25 Law Week 3254, for the purpose of determining the precise question now here argued by this appellant, i.e., whether or not the indictment of filing a false and fraudulent return may state more than an offense under 3616(a) Internal Revenue Code of 1939.

Statute of Limitation expired prior to indictment

4. If the offense for which appellant is indicted is only a misdemeanor, then the statute of limitations had expired prior to the filing of the indictment. Limitations on penal prosecutions under I.R.C. 1939 were governed by § 3748 thereof, which provides as follows:

> "§ 3748. Periods of limitation — (a) Criminal prosecutions.
>
> No person shall be prosecuted, tried, or punished, *for any of the various offenses arising under the internal revenue laws of the United States* unless the indictment is found or the information instituted within *three years* next after the commission of the offense, except that the period of limitation shall be five years for offenses enumerated in section 4047(e) (relating to unlawful acts of revenue officers or agents) and except that the period of limitation shall be six years—
>
> (1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner,
>
> (2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payments thereof, and
>
> (3) for the offense of willfully aiding or assisting in, or procuring, counseling, or advis-

A certified copy of said Motion is attached hereto.

CUNNINGHAM & WEINSTEIN
Attorneys for Appellant
37 N. E. First Avenue
Miami 32, Florida

By: _____

FILED
MIAMI, FLA.
SEP 21 1953
JULIAN A. BLAKE
CLERK

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

MIAMI DIVISION.

No. 8441-M-Criminal

UNITED STATES OF AMERICA,
Plaintiff,
vs.
MILTON J. HARRIS,
Defendant.

MOTION BY DEFENDANT TO DISMISS THE INDICTMENT AND MOTION FOR THE PRODUCTION OF RECORD OF OATH TO WITNESS BEFORE GRAND JURY.

I. MOTION BY DEFENDANT TO DISMISS THE INDICTMENT.

Defendant moves that the indictment be dismissed on the following grounds:

a. This indictment is defective because it is verily believed that the oath administered to witnesses before this Grand Jury was improper in that a party was not named with a specified offense and the oath is otherwise improper.

b. This indictment does not state facts sufficient to constitute an offense against the United States.

II. MOTION FOR THE PRODUCTION OF RECORD OF OATH TO WITNESSES BEFORE BEFORE GRAND JURY.

a. This indictment is defective because it is verily believed that the oath administered to witnesses before this Grand Jury was improper in that a party was not named with a specified offense and the oath is otherwise improper.

b. This indictment does not state facts sufficient to constitute an offense against the United States.

II. MOTION FOR THE PRODUCTION OF RECORD OF OATH TO WITNESSES BEFORE BEFORE GRAND JURY.

a. The defendant moves that the United States of America, plaintiff, furnish to defendant a record or report of the swearing in or in its place a copy of the oath which was administered to the witnesses before the grand jury when the case against the defendant was presented.

BLACKWELL, WALKER & GRAY
Attorneys for Defendant

By _____
First Federal Bldg.
Miami 32, Florida.

Southern
Eleanor A. McGinty

ing, the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document)." (emphasis supplied)

In the case at bar, it is plain from the face of the indictment (R. 1) that the appellant was, on February 27, 1953, indicted for an offense alleged to have occurred on the 5th day of March 1947. Therefore, unless appellant's offense came within the exceptions contained in subparagraphs (1) (2) or (3) of the statute above cited, the statute of limitations on his offense would have run on March 5, 1950, or nearly three years before the filing of the indictment herein. In other words, a violation of § 3616(a), Internal Revenue Code of 1939, carried only a three year statute of limitations, and no indictment for the violation of this section will lie after the expiration of three years.

At the time of arraignment, September 21, 1953, appellant filed a motion to dismiss the indictment (see following section), which was, on March 16, 1955, denied by the trial court (R. 6). It could not be questioned that the defense of statute of limitations is raised by a motion to dismiss the indictment, *Pinkerton v. United States*, 151 F. 2d 499 (C.A. 5, 1945); *United States v. Laut*, 17 F.R.D. 31 (D.C.S.D.N.Y. 1945); Federal Rules of Criminal Procedure, 18 U.S.C.; and there is good authority that it is raised merely by a plea of not guilty. *United States v. Parrino*, 203 F. 2d 284 (C.A. 2, 1953).

Therefore, if the statute of limitations had expired, as to the offense actually stated by the indictment herein, the trial court committed plain error in denying appellant's motion to dismiss the indictment.

Contention should be considered

5. This Court can and should consider this question. As mentioned earlier, the Supreme Court of the United States granted certiorari in the *Costello* case, supra, on January 29, 1957, after the preparation of the brief in the present case. Thereafter, on March 5, 1957, the Supreme Court granted certiorari in the *Achilli* case, supra. Appellant's counsel candidly admit to this Court that, because of the time at which the Supreme Court announced its decision to review these cases, the trial court's action in denying the motion to dismiss has not been previously argued or presented. Nevertheless, this Court, especially in cases involving life or liberty, has the inherent power to make such orders as it sees fit, and has expressly reserved to itself under its Rule 24(2)(b) the power to notice a plain error, not specified.

It is respectfully submitted that the conviction and sentencing of a defendant under an indictment upon which the statute of limitations has run, is the type of error contemplated by this Rule. Especially is this true where, as in the case at bar, the grounds for review were properly preserved in the lower court.

It is submitted that the desirability of granting a rehearing is made greater by the fact of the pendency of the *Costello* and *Achilli* cases in the Supreme Court, since a new decision in the Supreme Court is ample grounds for

a Court of Appeals to grant a rehearing and reverse its previous decision. *Brenna v. Federal Cartridge Corp.*, 183 F. 2d 414 (C.A. 8, 1950).

That the appellant's contention may and should be considered by this Court on its merits, is further underlined by the fact that the Supreme Court granted certiorari in the *Achilli* case, even though the challenge to the judgment (on similar ground to that urged here) was not made until a petition for rehearing in the Court of Appeals, and the grounds therefor were not preserved in the lower court (as they *were* in the case at bar). See 234 F. 2d 797, 808.

CONCLUSION

For the reasons above urged, this Court should consider appellant's contentions on their merits, and should grant a rehearing in this cause. In the alternative, this Court should withhold its ruling on this petition and stay its mandate until the decision of the Supreme Court in the *Costello* and *Achilli* cases, so that appellant may not be taken into custody under a sentence which may be illegal.

Respectfully submitted,

CUNNINGHAM & WEINSTEIN
Attorneys for Appellant
37 N. E. First Avenue
Miami 32, Florida

ARTHUR B. CUNNINGHAM

PHILIP T. WEINSTEIN

MOTION TO CORRECT RECORD

Comes now the appellant, and in the interests of justice and pursuant to Rule 18 of the Rules of this Court, moves this Court to correct the Record on Appeal heretofore prepared in this cause, by including the following:

"MOTION BY DEFENDANT TO DISMISS THE INDICTMENT AND MOTION FOR THE PRODUCTION OF RECORD OF OATH TO WITNESS BEFORE GRAND JURY, filed September 21, 1953, in words and figures as follows:

I. MOTION BY DEFENDANT TO DISMISS THE INDICTMENT.

Defendant moves that the indictment be dismissed on the following grounds:

a. This indictment is defective because it is verily believed that the oath administered to witnesses before this Grand Jury was improper in that a party was not named with a specified offense and the oath is otherwise improper.

b. This indictment does not state facts sufficient to constitute an offense against the United States.

* * *

BLACKWELL, WALKER & GRAY
Attorneys for Defendant

By s/ CLEMMONS J. EHRLICH
First Federal Bldg.
Miami 32, Florida."

It is hereby certified that a true and correct copy of the above and foregoing Petition for Rehearing, Brief in Support, and Motion to Correct Record has been furnished James L. Guilmartin, United States Attorney, Federal Building, Miami, Florida, by hand this
day of April 1957.

ORDER DENYING PETITION FOR REHEARING AND MOTION TO CORRECT RECORD.

Extract from the Minutes of May 8, 1957.

MILTON J. HARRIS,

No. 16074 versus

UNITED STATES OF AMERICA.

It is ordered by the Court that the petition for rehearing and the motion to correct record filed in this cause be, and the same is hereby, denied.

* * * * * * * *

MOTION OF APPELLANT FOR STAY OF MANDATE FILED - MAY 16, 1957.

UNITED STATES COURT OF APPEALS

FOR THE

FIFTH CIRCUIT

MILTON J. HARRIS,	:	
Appellant,	:	
-vs-	:	No. 16,074
UNITED STATES OF AMERICA,	:	
Appellee.	:	
	:	

PETITION FOR
STAY OF THE MANDATE

COMES NOW THE APPELLANT in the above-styled cause and in accordance with Rule 32 of the Rules of this Court petitions for a stay of the issuance of the Mandate in the above-styled cause forthe reasons that the appellant intends to file with the Supreme Court of the United States a Petition for a Writ of Certiorari directed to this Court.

CUNNINGHAM & WEINSTEIN
Attorneys for Appellant
37 N. E. First Avenue
Miami 32, Florida

By: /s/ Philip T. Weinstein

IT IS HEREBY CERTIFIED that a true and correct copy of the above and foregoing Petition for Stay of the Mandate has been mailed to Honorable James L. Guilmartin, United States Attorney, Federal Buildingg, Miami, Florida, this 15th day of May 1957.

/s/ Philip T. Weinstein

(P.277)

ORDER STAYING MANDATE FILED - MAY 22, 1957.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

MILTON J. HARRIS,

Appellant,

versus No. 16074

UNITED STATES OF AMERICA,

Appellee.

ON CONSIDERATION OF THE APPLICATION of the Appellant in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable him to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days from May 8, 1957; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from May 8, 1957 there shall be filed with theclerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from May 8, 1957, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

DONE AT NEW ORLEANS, LA., this 22nd day of May, 1957.

/s/ ELBERT P. TUTTLE

United States Circuit Judge.

CLERK'S CERTIFICATE.
UNITED STATES OF AMERICA, UNITED
STATES COURT OF APPEALS
FIFTH CIRCUIT.

I, EDWARD W. WADSWORTH, Clerk of the United States Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 244 to 277 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Court of Appeals for the Fifth Circuit, in a certain cause in said Court numbered 16074, wherein Milton J. Harris, is appellant, and United States of America, is appellee, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 243 are identical with the printed record upon which said cause was heard and decided in said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Court of Appeals at my office in the City of New Orleans, in the Fifth Circuit, this 22nd day of May, A. D., 1957.

(SEAL)

/s/ Edward W. Wadsworth
Clerk of the United States
Court of Appeals, Fifth Cir.

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JUN 6 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. ~~1061~~ 167

MILTON J. HARRIS,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ARTHUR B. CUNNINGHAM,
PHILIP T. WEINSTEIN,
Attorneys for Petitioner,
37 N. E. 1st Avenue,
Miami 32, Florida

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IN THE

Supreme Court of the United States

October Term, 1956

No. _____

MILTON J. HARRIS,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

May it Please This Honorable Court:

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals (Appendix, Page 1) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 9, 1957. Petition for Rehearing was timely filed, which Petition was denied on May 8, 1957.

The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254.

QUESTIONS PRESENTED FOR REVIEW

I

Where an accused is, by indictment, charged with a violation of Section 145 (b), Internal Revenue Code 1939, "by filing and causing to be filed . . . a false and fraudulent income tax return . . ."; does the indictment state ANY offense against the United States, in the absence of allegations of aggravating circumstances?

II

Where, in a case involving the liberty and property of an accused, a substantial question, challenging the jurisdiction of the District Court, is raised in the Court of Appeals on a petition for rehearing (although preserved in the District Court), was it not error and a serious departure from the accepted and usual course of judicial proceedings for the Court of Appeals summarily to refuse to consider such question?

III

Where the petitioner was charged with income tax evasion for failure to report one single item of income in the amount of $45,000, may the petitioner properly be convicted of the felony proscribed by Section 145(b) Internal Revenue Code 1939, where this same item was reported on the income tax return of petitioner's wholly owned real estate corporation?

IV

Did a sua sponte remark by the Trial Court relative to the jury's recommending sentence have the effect of inducing a verdict and depriving petitioner of due process of law and his rights to trial by an impartial jury?

STATUTES INVOLVED IN QUESTION I

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) **Failure to Collect and pay over tax, or attempt to defeat or evade tax.** Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts

in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

(26 U.S.C. 1946 ed., Sec. 145).

SEC. 3616. PENALTIES.

Whenever any person —

(a) **False returns.** Delivers or discloses to the collector or deputy any false or fradulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made; * * *

(28 U.S.C. 1946 ed., Sec. 3616.)

STATUTES INVOLVED IN QUESTION II

Rule 52, Federal Rules of Criminal Procedure

Harmless Error and Plain Error

* * * * *

(b) **Plain Error.** Plain errors or defects affecting substantial rights may be noticed

> although they were not brought to the attention of the court.

(Federal Rules of Criminal Procedure, Title 18 U.S.C.)

Rules of the United States Court of Appeals for the Fifth Circuit, Rule 24. 2. (b):

> "A specification of the errors relied upon, which shall set out separately and particularly each error asserted and intended to be urged. Errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not specified."

STATEMENT

On February 23, 1953, an indictment (R. 1) was filed in the United States District Court, charging the petitioner with the felony of income tax evasion, in violation of Section 145 (b) Internal Revenue Code 1939. The act by which this felony was alleged to have been committed allegedly occurred on March 7, 1947, and consisted of "filing and causing to be filed . . . a false and fraudulent income tax return . . ." (R. 1).

Petitioner moved to dismiss the indictment for failure to state an offense (R. 273). This motion was denied by the trial court (R. 6).

Upon petitioner's motion, the trial court ordered the indictment to be supplemented by a bill of particulars (R. 6). This bill of particulars (R. 9) (considered in connection with petitioner's income tax return) defined the

issues in the case: the respondent thereby contending that petitioner had failed to report one specific item of income, to wit: a real estate commission in the sum of $45,000.00. No other item of income was questioned, according to the bill of particulars, and petitioner's expenses were "allowed per return" (R. 9).

The evidence upon which petitioner was convicted may be summarized as follows:

During the calendar year 1946, through petitioner's efforts, a real estate commission in the sum of $45,000.00 was earned. This item did not appear on petitioner's individual income tax return, but it **was reported** by the petitioner in the return of the M. J. Harris Co., petitioner's wholly-owned real estate corporation (Govt. Ex. 2, line 14). Over objection, the respondent was also allowed to show that petitioner had not filed individual income tax returns for years **prior** to the year under prosecution (R. 52. 59, et seq.).

The record shows that the jury retired at 4:10 P.M. and at 5:30 P.M. on the same day had returned for further instructions, and the following colloquy ensued:

"The Foreman:

Judge, we have a question as to a verdict. Is it all right to ask this in open Court?

The Court:

Yes, and if I can answer it I will do so. If I cannot answer it I will tell you I cannot, and the reasons:

The Foreman:

We are in a quandry whether we must render a verdict of guilty with willful intent, or whether or not we can render a verdict of guilty without willful intent. Would you make that clear?

The Court:

If there is no willful intent you cannot find him guilty. You can recommend as to sentence if you want to, but beyond that you cannot do anything.

The Foreman:

Thank you, Your Honor. You have answered our question. (emphasis supplied) (R. 190-191)

Thereafter the jury, not having reached a verdict, were put away for the night. The next day the jury likewise returned for additional instructions (R. 133-210). During deliberations, which consumed the major portion of the day, the questions asked by the jury clearly showed a difficulty in agreement and a concern with whether the degree of culpability was sufficient to justify conviction. (R. 204).

Finally, after the Court gave the Allen "dynamite" charge (Allen v. United States, 164 U.S. 492, 17 S. Ct. 154, 41 L.Ed. 528 (1896) in addition to other instructions, the jury at 3:59 p.m. of the second day returned its verdict as follows:

"We, the jury, find the defendant Guilty as charged with a **strong** recommendation for clemency." (R. 217).

The trial court, upon the verdict of the jury, sentenced petitioner to six months imprisonment and imposed a fine of $2,000 (R. 218).

Appeal was taken to the United States Court of Appeals for the Fifth Circuit, which, on April 8, 1957, rendered its opinion (Appendix 1), affirming the District Court. Petitioner, within the time prescribed, filed his petition for rehearing, together with a motion to correct record (R. 271), for the purpose of presenting to the Court of Appeals substantial questions which had arisen by reason of the Honorable Supreme Court's grant of Certiorari in the cases of **Costello v. United States**, (Docket No. 666, Oct. Term 1956), 25 L.W. 3222, and **Achilli v. United States** (Docket Nos. 430 and 834, Oct. Term 1956), 25 L.W. 3252. Both of these orders, occurring respectively on January 29, 1957, and March 5, 1957, were subsequent to the preparation of appellant's brief and specifications of errors in the court of appeals. The Court of Appeals, by its orders dated May 8, 1957 (R. 275), indicated that it had not only rejected petitioner's contentions, but specifically had declined to consider them.

REASONS FOR GRANTING THE WRIT AS TO QUESTION I

Now that the Court has found that the United States attorney may, constitutionally, **elect** to prosecute a given act of filing a false return under **either** Section 145(b) or Section 3616(a), there is still an important Federal

question which must be settled by this Court: Where the indictment charges a felony, but states facts sufficient only to constitute a misdemeanor, is the entire indictment invalid?

The Court has found a distinction between the felony of wilfully filing a false and fraudulent return with intent to evade taxes, and the misdemeanor of filing a false and fraudulent return wit hthe same intent.[1] If such a distinction exists, it must only be on the basis that there are some **aggravating elements** present in the felony cases which are not present in misdemeanor cases—logic and the case law do not permit of anw other conclusion. In the landmark case of **Spies v. United States**, 317 U.S. 492, this Court suggested that such elements might consist of:

> "*** conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income; handling one's affairs to avoid making the records usual in transactions of the kind and any conduct the likely effect of which would be to mislead or conceal.***" 317 U. S. 499.

If, however, such elements are necessary to make the felony proscribed by Section 145(b), then such elements **must be stated in the indictment.** Thus, in the leading case of **Aderhold v. Pace**, 65 Fed. 2d 790 (C.A. 5, 1933), a prisoner was discharged after serving less time than the offense for which he had pleaded guilty. The Court said:

[1] Congress did not eliminate the words "with intent to defeat or evade" from former Section 3616(a) until it enacted Section 7207 of the Internal Revenue Code of 1954.

> "Any aggravation of an offense for which the law authorizes an increase of punishment must be stated in the indictment. 1 Bishop's Cr. Law, §601. Mr. Bishop also says that
>
> to punish one for all of a crime where only a part of it is charged is to punish him without accusation. 1 Bishop's Cr. Pro. §§ 77, 80, 84. So far as we are aware, there is no authoritative decision to the contrary. Certainly it cannot fairly or justly be said that Pace, because he pleaded guilty to a charge of selling an unnamed quantity of intoxicating liquor, thereby admitted he had sold more than a gallon." 65 F. 2d 791

This same rule is found in other cases: **Olivito v. United States,** 67 F. 2d 564 (C.A. 9, 1933); **Meyers v. United States,** 116 F. 2d 601 (C.A. 5, 1940).

In other words, an indictment must charge and state each and every element of an offense. **United States v. Standard Brewery, Inc.,** 251 U.S. 210, including any facts in aggravation, if such are necessary to make up the offense charged. **Jordan v. United States,** 233 F. 2d 362 (C.A.D.C. 1956); **United States v. Scarlata,** 214 F. 2d 807 (C.A. 3, 1954).

Here, the respondent has **by the terms of the indictment** elected to charge petitioner with a felony. However, the indictment does not state any facts which distinguish the act charged (filing a false return) from the misdemeanor of filing a false return. Thus, the indictment **does not** state a violation of Section 3616(a) and **cannot** state a violation of Section 145(b). In such circumstance,

the petitioner urges the Court that he was correct when he stated in his motion to dismiss that the indictment did not state facts sufficient to constitute an offense against the United States. This question must also be ultimately settled by this Court.

This Court recently (May 27, 1957) recognized that the filing of a false and fradulent return was a "classic method" of violating former Section 145(b). **Achilli v. United States**, 25 L.W. 4335. This Court did not say, however, that the offense was alleged in the absence of the essential allegations of aggravating circumstances. To so interpret this Court's recent decision would be tantamount to stating that murder could be alleged without alleging a killing, or that assault and battery could be alleged without an aggressive touching. An indictment containing only allegations of the filing of a false and fradulent return is or should be held to be defective as being too vague, indefinite and uncertain. Such allegations standing alone fail to state an offense against the United States within the purview of former Section 145(b), Internal Revenue Code of 1939.

REASONS FOR GRANTING THE WRIT AS TO QUESTION II

This Honorable Court's grant of certiorari in the **Costello** and **Achilli** cases came after the preparation and filing of petitioner's brief in the Court of Appeals below. After an adverse decision, petitioner timely filed a petition for rehearing in which he presented to the Court of Appeals the questions raised in this Petition. Together with the petition for rehearing was a motion to correct the record, under the Rules of the Fifth Circuit, for the

purpose of placing before the Court of Appeals Petitioner's motion to dismiss the indictment made in the district court. The Court of Appeals, quickly, summarily, and without hearing denied this petition (R. 275). Patently, the Court of Appeals could give no consideration to that which it did not permit to come before it.

Petitioner respectfully submits that this action of the Court of Appeals, in a case involving his liberty, is such a departure from the accepted and usual course of judicial proceedings within the meaning of Rule 19(b) of the Rules of this Court as to call for an exercise of this Court's power of supervision.

In the first place, the questions which the petitioner raised, and now raises, were jurisdictional questions — questions going directly to the power of the trial court to impose sentence upon petitioner. A jurisdictional question may be raised at any time—whether it was preserved below or not—at any stage of the proceedings. The Court of Appeals grieviously erred, under the circumstances, by refusing to consider these questions.

If no offense was charged against the petitioner (Question I) the trial court had no jurisdiction to try and sentence the petitioner.

The questions were preserved in the lower court by petitioner's motion to dismiss indictment, by his plea of not guilty, by his motions for judgment of acquittal and his motion for new trial. Failure to argue a point on appeal does not constitute a waiver, and petitioner's specification of error in the Court of Appeals numbered 10 and 12 (relating to judgment of acquittal), together with the

petition for rehearing itself, were sufficient to raise and preserve all of petitioner's contentions.

Perhaps most important of all, Federal courts, even this Honorable Supreme Court, have the power and duty to notice plain or jurisdictional error, even if not properly preserved. Rule 52(b), Federal Rules of Criminal Procedure, Title 18 U.S.C.; Rule 24(b), Rules of the Court of Appeals for the Fifth Circuit.

Here the Court of Appeals could not know whether or not there was any plain error or jurisdictional question, because it declined even to allow to be placed before it the portions of the record below necessary for a consideration of these questions.

It is respectfully submitted that in cases involving liberty, it is far to dangerous for this Court to sanction or permit this type of aloofness in a Court of Appeals. Petitioner should not be denied due process of law for any possible procedural errors of his counsel.

REASONS FOR GRANTING THE WRIT AS TO QUESTION III.

In the case at bar the Government had by its indictment and bill of particulars indicated that "the prosecution was based solely on the failure of the tax payer to include a single $45,000. item of income". (Opinion of Court of Appeals, Appendix Page 1). The petitioner concedes that even a prosecution based solely upon a taxpayer's failure to report one single item of income might under certain circumstances be sufficient to make out a violation of Section 145 (b). This would be the case if

the item were concealed, suppressed, unreported, or in some other manner hidden. In the case at bar, however, the factual situation was just the opposite, as the Court of Appeals might easily and conclusively have determined by a mere inspection of only one piece of documentary evidence, i.e., Government Exhibit 2 (1946 Federal Income Tax Return of the M. J. Harris Company) where the "fraud item" was plainly reported for all the world to see. The Petitioner submits that, in affirming a conviction under this factual situation, the Court of Appeals has acted contrary to the applicable decisions of the Supreme Court and of other Courts of Appeal, and has initiated what may well be a dangerous and highly undesirable trend.

The essence of the crime of income tax evasion is **concealment.** This was finally decided and put at rest by the decision of this Honorable Court in the landmark case, **Spies v. United States,** 317 U.S. 492 (1943). In this case the Supreme Court held that the failure to file an income tax return, regardless of what effect it might have on a defendant's tax liability, could not be the basis for a prosecution for tax evasion. This was so because the factual situation would lack the **positive act of concealment** necessary to make out "the gravest of offenses against the revenues ***". Thus, the failure to file a return, though it might seem to come within the meaning of the phrase "in any manner" found in the statute, did not in fact constitute one of the means by which the evasion might be accomplished. The Court, through Mr. Justice Jackson, said:

> "The Courts did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did

not define lest its efforts to do so should result in some unexpected limitation. Nor would we by definition constrict the scope of the Congressional provision that it may be accomplished 'in any manner'. By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making records usual in transactions of the kind, and *any conduct, the likely effect of which would be to mislead or to conceal.* If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes, such as concealing of other crime." (Emphasis supplied) 317 U.S. 492, 499.

This pronouncement became the guide post for Courts of Appeal in determining when evidence was sufficient to go to the jury in tax evasion cases. For example, in the case of **Scheuermann** v. **United States,** 174 2d. 397 (C.A. 8, 1949) the Court sustained a conviction:

"*** because the evidence disclosed the usual badges of indicia **of the deliberate concealment of income,** namely: (1) Intentional failure to maintain financial records; (2) a much visited safety deposit box, rented under an assumed name; (3) the use by the defendant, in his dealings; of large sums of currency; and (4) pur-

chases of property by the defendant in others' names." 174 F. 2d 397, 398. (Emphasis supplied).

The same rule again appears in the case of **Battjes** v. **United States,** 172 F. 2d. 1 (C.A. 6, 1949.) The Court of Appeals upheld a conviction for income tax evasion in a case where the defendant **had failed to report** a payment of money or even refer to it in his return, or in any manner bringing it to the attention of the Internal Revenue agents. The Court of Appeals held the conviction should be sustained because the conduct showed the all important element of concealment.

" *** His failure to report the payment received in 1941 from the State of Michigan, together with the failure to refer to it in his return, or to bring it to the attention of the revenue agents with an appropriate explanation was properly before the Court on the issue of willful intent. In Spies v. United States, 317 U.S. 492, at page 499, 63 S. Ct. 364, 368, 87 L. Ed. 418, it was stated that 'affirmative willful intent may be inferred from conduct such as *** handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal.' **The actual effect of Battjes' conduct was to conceal.**" 172 F. 2d 1, 5 (emphasis supplied).

One of the best discussions of the particular principles herein advanced by the Petitioner is found in an opinion by a District Judge, the distinguished Leon Yankwich of California. Thus, in the case of **United States** v.

Cole, 90 F. Supp. 147 (D.C.S.D. Cal. 1950), the Court granted a motion for a judgment of acquittal in an estate tax evasion case. In that case there was an estate tax return which was alleged to have been false and fradulent because certain shares of stock had been omitted from the return. The claim of the Government was that certain stock shares, consideration for which had been paid by decedent, were in reality an asset of the estate. The stocks had been **referred to in the return** as "owned by others" but had been omitted in computing the tax liabilities. In granting motions for judgment of acquittal the District Judge wrote an illuminating analysis of this Court's decision in the Spies case, which Petitioner herewith adopts as his own argument:

> "*** On certiorari, the Supreme Court (in the Spies case) held that this section (145(b)) and the kindred sections cover not mere failure to act as required by law,—but refer to attempts to defeat the purpose of the Act by **fraudulently concealing** matter which should go into returns, or by which, if reported would result in a tax. *** (emphasis by court)
>
> "*** (The court quotes the matter in the Spies case previously quoted in this petition).
>
> "In brief, the Court tells us that when the Congress spoke of 'willful' acts, they had in mind acts of the type which by common knowledge are done to 'conceal'."
>
> "If the facts are such as would have the effect of 'revealing', — to use the antonym of **con-**

ceal', — we are not in the domain covered by this section. All the cases decided since this decision was rendered had some of the elements of fraudulent concealment, to which the Court referred. (emphasis supplied).

"**** And a case should not go before a jury if the facts are only of a character which may lead to speculative conjectures. This is especially true in a case of this character, which requires a specific intent. — **the intent to defraud the Government.** (emphasis by court).

"The conclusion just announced, — on the basis of the law as applied to undisputed facts, is reinforced by the uncontroverted acts of the defendants, surrounding the filing of the return.

"Decisions dealing with the quantum of proof in these cases **require positive acts of concealment.** The falsification of books or other "paper" work, instructions to those in charge to hide money or assets, or to fabricate records. No such facts appear in this record. On the contrary, the return itself offers proof of opposite intent. Instead of concealing the certificate which was found in the box endorsed in blank, the defendants referred to them in the return as excepted stock 'which are owned by others.' This was notice to the Government, — if the Government needed any notice, — that there were items found in the box inventories by the representative of the State of California which

the executors had not returned as a part of the estate. (emphasis supplied).

"In the face of this, how can the Government maintain that there was concealment? For this is **revealment,** — just the opposite of **concealment.**" (emphasis by court) 90 F. Supp. 147, 152, 153, 158.

Other courts have similarly held that the highest revenue crime cannot be committed without sufficient evidence of concealment. **Spriggs** v. **United States,** 198 F. 2d 782 C.A. 9 1952. **United States** v. **Berman,** 75 F. Supp. 789 (D.C. N.D. Ga. 1947). **United States** v. **Carleton,** 138 Fed. Supp. 510 (D.C. W. D. Okla 1956).

The rule of the Spies case was again inferentially recognized by this Court in the case of **Holland** v. **United States,** 348 U.S. 171 (1954), when the Court stated that wilfullness could not be inferred from a mere understatement of income.

The Petitioner submits that there is completely lacking in the case at bar the essential elements of concealment which is necessary to make out an offense under Section 145(b). The only questioned item in this case—the real estate commission in the amount of $45,000. — was reported to the Government on the income tax return of the M. J. Harris Company. Assuredly, one does not **conceal** income by reporting it on an income tax return. This is in the words of Judge Yankwich—**"Revealment—** which is the opposite of **concealment."** It makes no difference for this purpose if the real estate commission was correctly or incorrectly reported as a matter of law.

Neither does it make any difference what the Petitioner's conduct may or may not have been in years prior to the year under prosecution. The significant fact is that the sum alleged to have been fraudulently omitted from the Petitioner's income tax return was not hidden, not concealed, not suppressed; there were no secret transactions, hidden deals, double set of books, surreptitious handling of cash, falsifying of records, nor any of the other standard or traditional indicia of fraud.

Rather, this amount is plainly stated on an income tax return for all the world to see, and especially for the Government's auditors to see. It must be remembered that at the time the return in question was filed, March 5, 1947, (R 1) the Petitioner had already been under investigation for nine months, for income tax for prior years (R 54, testimony of Government witness Nisensen) and was well aware of this act. Thus, there could have been no doubt in either the Petitioner's mind or the mind of the Revenue Department, that the 1946 income tax returns of both the Petitioner and his wholly owned corporation would soon be subject to close scrutiny and analysis by the Government's agents.

We respectfully submit that the Court of Appeals in sustaining this conviction has committed a grievous and dangerous error and is in conflict with this Court's opinion in the **Spies** case. A close reading of the opinion of the Court of Appeals will indicate most plainly that the Court's expressed indignation at Petitioner's conduct for prior years has caused it to ignore and depart from these well settled principles. Indeed, a sustaining of a conviction under these circumstances might well lead to a most dangerous and undesirable situation wherein any error on

a tax return, such as the misdesignation of ordinary income as capital gain, the over-estimation of depreciation, of the mistaken attribution of the income might well be prosecuted as tax evasion, for there can be scarcely any case in which **some** inference of wilfulness on the part of the taxpayer may not be drawn.

In view of the apparent increasing numbers of criminal prosecutions arising under the revenue laws; it is respectfully submitted that certiorari should issue so that the Supreme Court may consider this question and re-establish the necessity of concealment for the making out of a felony. Otherwise the most innocent error might, technically subject the taxpayer to prosecution for a felony.

REASONS FOR GRANTING THE WRIT AS TO QUESTION IV

The Petitioner invites the Court's attention to the portion of the facts in the case set out at pages 6, 7 infra. Petitioner urges this Court that the cited remark of the trial court relative to recommending sentence may at such time and under such circumstances as it was, have the effect of improperly inducing a verdict against the Petitioner and under circumstances amounted to a denial of due process and his right to trial by a jury guaranteed by Amendments V and VI of the Constitution; and that the Court of Appeals' unconcerned sanction of this act, and dismissal of Petitioner's complaint as mere trivia, constitutes such a departure from accepted and usual judicial standards as to call for an exercise of this Court's supervisory jurisdiction.

It is the settled law of practically all jurisdictions that, in a criminal case, any indication or action on the part of the trial court which may reasonably lead the jury to believe that a finding of Guilty will result in a suspended sentence, leniency, probation or early parole, is reversible error. **Demetree** v. **United States,** 207 F. 2d 892, (C.A. 5, 1953); **Smith v. United States,** 230 F. 2d 935 (C.A. 6, 1956); **Bryant v. State,** 205 Ind. 372, 186 N.E. 322 (1953); **People** v. **Sherman,** 35 N.Y.S. 2d 471 (1942); **Bethel** v. **State,** 162 Ark. 76, 257 S.W. 740, (1942); **People** v. **Covey,** 137 Cal. App. 517, 30 P. 2d 1010 (1934); **James** v. **State,** 77 Okla. Crim. 108, 139 P. 2d 202; **Andrews** v. **State,** Ark, 282 S.W. 2d 592; **Lawley** v. **State,** Ala., 87 So. 2d 433.

The recent case of **Smith** v. **United States,** supra, is a case strikingly similar on this point to the case at bar. There the Sixth Circuit found plain and prejudicial error in the following circumstances:

The jury returned, after deliberating for two hours, for further instructions, one of the members asking if the jury could write the words a "mitigating circumstance" in the verdict of Guilty. The Court said that this was not the type of case where this could be done, but said:

> "If *** you desire to make some recommendations to the Court along the lines you have in mind the Court will be glad to have such recommendations". 230 F. 2d 935, 940.

In reversing the Court said:

> "It is best simply to advise the jury that they have nothing to do with the penalty. Here the

judge not only charged that the penalty could be as light as $1.00 and the prison sentence as short as one day, but also stated that he would be glad to receive the jury's recommendation of leniency. He added that it was usual to sentence after hearing and after full investigation, yet as soon as the jury's recommendation of leniency was received sentence was imposed and the defendants received a severe punishment. At least one member of the jury at the time of the colloquy with the court was hesitating as to his final decision. We think the error was prejudicial." (230 F. 2d 935, 940).

Petitioner has urged the Court of Appeals that his complaint in this case presented an even stronger showing of error than did the **Smith** or **Demetree** cases cited, and asked for a reversal on that ground. The Court of Appeals summarily dismissed this claim with the holding that the remark of the trial court was "not *** calculated to induce a verdict of Guilty, citing as authority therefor a case in no wise related to the question. (See Appendix Page 11).

The Petitioner submits that, in so lightly passing off Petitioner's contention in this regard, the Court of Appeals has sanctioned a grave error by the trial court which will tend to create a highly undesirable precedent for the conduct of jury trials in Federal courts. In the case at bar the trial court's remark as to sentence was not even responsive to the question concerning "wilfullness" put to him by the jurors, but was volunteered by the Court. The circumstances under which it was made, and the inquiry which was the basis of the statement, showed plainly that

the jury was at this time entertaining grave doubts as to the wilfullness of the defendants and were reaching in all directions for some basis for compromise. This basis the judge obviously supplied them, for the verdict was that of Guilty with a "strong recommendation for clemency". (R. 217). It makes no difference whether an exception was taken to this remark or not, although counsel for the Petitioner contends that the point was preserved to them (R. 210) and that the Court of Appeals was incorrect in holding that Petitioner's counsel opposed correction. Regardless, however, this remark is not an instruction to which an exception should be required under Rule 30, Fed. Rules of Crim. Proc. Title 18 U.S.C. It was rather an open inducement to render a verdict upon the Court's implied promise that the recommendation therein would be observed.

This is a serious question touching upon the conduct of every single criminal case tried in the trial courts. If allowed to stand unchallenged, the decision of the Court of Appeals will present an injurious chipping away of a defendant's right to have his guilt impartially determined by a jury solely upon the basis of the facts.

It is respectfully submitted that certiorari should issue to review this matter.

CONCLUSION

For all of the four above and foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ARTHUR B. CUNNINGHAM,

PHILIP T. WEINSTEIN,
Attorneys for Petitioner.

May, 1957.

PROOF OF SERVICE

The undersigned, of counsel for the petitioner in the within Petition for Certiorari, hereby certifies that four copies of the above and foregoing Petition for Writ of Certiorari has been served upon the Honorable J. Lee Rankin, Solicitor General of the United States, Department of Justice, Washington 25, D. C., and upon Honorable James L. Guilmartin, United States Attorney, Federal Building, Miami, Florida, this ——— day of June, 1957.

(APPENDIX "A")

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16074

MILTON J. HARRIS,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(April 9, 1957.)

Before TUTTLE, JONES and BROWN, Circuit Judges.

TUTTLE, Circuit Judge: This is an appeal from a judgment of guilty and sentence following a jury verdict finding that the appellant "did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1946 . . . ."

The principal ground of appellant's appeal is the admission by the trial court, over objection, of evidence

tending to show that certain deductions claimed by the taxpayer were duplicated as deductions claimed by his wholly owned corporation after the Government had, by its bill of particulars, indicated that the prosecution was based solely on the failure of the taxpayer to include a single $45,000 item of income. There are other contentions as to alleged improper admission of evidence as to prior years and incorrect charge to and comments to the jury.

Soon after the indictment was returned the appellant filed his motion for a bill of particulars which the trial court granted in part.[1] It is apparent that the defendant

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[1] In view of the great stock appellant takes in the matter of the Bill of Particulars, it is necessary to point out precisely what he requested by way of particulars and what the court directed the Government to furnish:

The motion asked for particulars as follows:

"1. The nature, or kind of each item and the amount of each claimed by the Government as making up the total gross income claimed by the Government to have been received by the Defendant in the year 1946.

"2. The type and amount of each deduction against the total gross income of the defendant for the year 1946, allowed in computing the alleged net income of defendant for said year;

"3. The type and amount of each deduction by defendant in his income-tax return for the year 1946, which has been disallowed in computing the alleged net income of defendant for said year;

"4. Whether it is claimed that defendant wilfully withheld or omitted from his income-tax for the year 1946, item and amount of income, and if so, the nature and kind and the amount of each claim.

"5. Whether it is claimed that defendant wilfully and knowingly deducted from his gross income for the year 1946, items which were not legally deductible, and if so, the nature and kind of such illegal deductions and amount of each such item."

The court granted the motion as to the following:

"2. That motion of defendant for bill of particulars is hereby granted, and the plaintiff, United States of America, shall submit to the defendant particulars in the following form and the substance:

asked for and got an order requiring particulars as to the items making up the gross income and of deductions allowed or disallowed *in determining the net income which is charged against the defendant.* The court refused to require any answer from the Government as to "whether it is claimed that defendant wilfully and knowingly deducted from his gross income for the year 1946 items which were not legally deductible, and if so the nature or kinds of such items."[2]

During the course of the trial there was evidence that amply authorized the jury to find that Harris individually earned and collected in 1946 a $45,000 real estate commission and that he did not include it on his personal income tax return for that year filed in Miami, Florida. The Government then produced evidence to the effect that this amount was reported on the tax return of the M. J. Harris Company, a Cleveland, Ohio corporation, which had a net loss for the year of over $39,000 (including loss carry-overs from 1944 and 1945), after including the item of $45,000. It thus became apparent that if the $45,000 item

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"(a). The general category and amount in each general category making the gross income alleged to have been received by the defendant for the calendar year 1946;

"(b) The general category and amounts allowed or disallowed by the Government *in determining the net income which is charged against the defendant.* Included in this shall be personal expenses allowed or disallowed, stated in a general category." (Emphasis added.)

2 The Government's response to the motion was in the following terms:

"Answering Paragraph 2 of the order as follows:

"(a) Net Gain from the Sale of Capital Assets	$23,163.83
Insurance Agency Fees	710.98
Real Estate Commissions	45,000.00
(b) Operating Expenses Allowed Per Return	28,714.28
Contributions, Real Estate & Sales Taxes Allowed	814.01"

was truly income to Harris he would profit by returning it as income to the corporation, because on account of the claimed loss position of the corporation it would owe no tax on it at all.

In order to prove the element of wilfulness which is an ingredient of the offense charged, the Government undertook to prove several things that were calculated to show that this was not a mere unintentional mistake by Harris. That it was such a mistake, of course, however much it benefitted him taxwise, would be a defense to the criminal proceedings if believed by the jury. It is the offer and admission of this proof that is the basis of appellant's principal attack here.

The first serious objection on the trial came when the Government sought to prove, as it did, that of the $28,714.28 of deductions claimed by Harris on his personal return, $17,605.16 of them were also claimed by the M. J. Harris Company as deductions for the same calendar year. This was proved by an analysis of Harris' personal expense sheet and of the company's expense sheet. Identical expenditures were found to have been entered on both records and were taken as deductions in the returns signed by him in one instance as an individual and in the other as president of the corporation.

The defendant vigorously assailed the action of the trial court in permitting any mention to be made of "deductions." He contended that the Government's bill of particulars admitted the deductibility of the $28,714.28

and that it would be improper for the court to permit the Government in any way to attack the validity or bona fides of a single dollar of the expenditures comprising this sum.

Upon the Governments representation that it proposed to show double deductions—once by Harris individually and once by his corporation—the court admitted the evidence solely as proof of the taxpayer's intent to defraud.

The court cautioned the jury on several different occasions that this evidence was not to be considered by them as proof of the correct amount of taxable income, but was admitted only as a circumstance to show Harris' intent in attributing the $45,000 income item to the corporation.

There is no merit in the appellant's criticism of the action of the trial court in this respect. In the first place it is to be noted that the court declined to require an answer to defendant's inquiry whether he wilfully and knowingly deducted items which were not legally deductible, but only required, as to deductions, that the Government show the amount of deductions allowed or disallowed in computing the net *income* of the taxpayer. This circumstance, of itself, was ample notice to defendant that the Government would not be precluded from attacking the defendant's alleged practice of taking the same deduction twice. This, of course, could only be shown by proof of the deductions taken, which proof the defendant objected to. Moreover, if the bill of particulars had not been

granted as to only a part of the inquiries made by the defendant we are satisfied that there is no rule of law that would have prevented the Government from showing, if it could; that some of the deductions were of a highly suspicious nature, not in an effort to increase the deficiency in the tax, but to show the defendant's knowledge and thus his intent as to what he was doing when he incorrectly attributed the income item to that taxpayer which had an excess of deductions over income. There is nothing in the case of *Bryan v. United States* (5 Cir.), 175 F. 2d 223, or the case of *United States v. Neff* (3 Cir.), 212 F. 2d 297, relied on by appellant, contrary to what we hold here.

The Government also tendered, and appellant objected to the introduction, of testimony in the form of a statement signed by the appellant following a question and answer session with a special agent. This evidence included statements that the accused had not filed any personal income tax returns since "the thirties" because, as he stated, he had been advised by the revenue agent that if he operated all his business and paid all his personal expenses through a corporation he need file only a corporation return. The statement also included an explanation by Harris of why he split a certain payment into five parts and opened five separate bank accounts, and also an explanation that he guessed he had failed to report a large payment "because I was up to my neck in marital troubles and stayed away from Cleveland and my records." Other evidence objected to included testimony by the agent that

Harris had told him this story and that he had advised Harris as to the true requirements.[1]

There was also testimony objected to by appellant to the effect that substantial disbursements, carried as deductions from income, represented payments to Harris' wife and mother-in-law and some represented payments to rare stamp dealers.

We think the court properly admitted all of this evidence for the purpose of showing the defendant's knowledge as to his obligation to return and his wilfulness in evading this obligation and pay income taxes. In view of his statement that he had a corporation that paid his personal expenses but that he nevertheless made no personal return, it was certainly competent for the Government to show the personal nature of some of the payments made

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1. The testimony showing that Harris had not filed any personal returns and that he was advised with respect to the need to file a personal return showing personal income follows:
"A. He [Harris] stated that his returns had been examined some time in the early thirties by an examiner whose name he couldn't recall, and who he could not identify in any way, and that he had been told inasmuch as he was operating his business through a corporation and he was the sole owner of the corporation that it would not be necessary for him to file personal income tax returns inasmuch as the corporation also paid all his personal expenses, and so he discontinued filing Form 1040, the individual tax return.
"Q. Did you have any further discussion concerning furnishing tax returns?
"A. Yes, I told him that whoever had told him that had obviously misinformed him, and that even though he operated as a corporation that corporation was separate and distinct from himself as an individual; that it was required of him that he file personal income tax returns, and anything the corporation disbursed for his benefit, or to him, or for him, was income to him personally and should be reported by him on an individual income tax return." In a signed statement defendant answered agent's question as follows:
"Q. Were you aware it was taxable income?"
"A. I never even thought of it. I made up my own income tax."

by him to demonstrate how fantastic his claimed understanding of the law really was. Moreover, his personal return which is the basis of the indictment carried the statement that he had filed a return for the year 1945. The Government, of course, should be permitted to prove this statement to be false by showing that he had filed no personal return for 1943, 1944 or 1945, which proof defendant also objected to.

There is no merit in the appellant's criticism of the admission of the signed statement on the ground that it contained hearsay. An admission signed by the accused that is relevant to the issue being tried is, of course, an exception to the hearsay rule. While cautioning lower courts that such admissions, if a critical part of the Government's case, must be corroborated to be admissible, the Supreme Court has expressly held them admissible as an exception to the hearsay rule:

> ". . . . . Admissions, retold at a trial, are much like hearsay, that is, statements not made at the pending trial. They had neither the compulsion of the oath nor the test of cross-examination. They are competent as an admission against interest."
>
> *Opper v. United States*, 348 U.S. 84 at 90.

See also *Monroe v. United States* (5 Cir.), 215 F. 2d 81, cert. denied, 348 U.S. 914, where we stated at page 83:

> "Admissions which are voluntarily made without any false promises or inducements are competent evidence against one charged with crime. In re White, D.C., 98 F. Supp. 985."

The fact that the questions put by the revenue agent embodied statements of fact does not make the questions inadmissible, since they were made to the accused and he responded to them. Neither, of course, is there any basis for appellant's objection to the agent's testifying on the trial itself as to conversations with the accused regarding his failure to file returns for prior years. It was clearly possible for the jury to infer from the fact that Harris had stated he paid all his personal expenses out of his corporation and that he refrained from filing personal returns not because he had no taxable income, but because he didn't think he had to, that he had sufficient income during the prior years to require the filing of a personal return. Especially is this true in light of the statement that he "was making $4200 every two weeks for five weeks and I opened up a new account in five different banks because I knew each account was insured up to $5000. Then when I got the Sylvania money *I took enough* to make each of the accounts $5,000 and left the balance in the Cleveland Trust." (Emphasis added.)

It also appears on his corporate records that he paid alimony of at least $500 in 1943 and of $2400 in 1945, which he charged to fees and salaries.

All in all there is ample evidence from the statements made by the accused to the agents and from his own personal and corporate records that for the years 1943 through 1945 Harris had sufficient personal income to require him to make a personal income tax return for those years, and the proof that he did not do so is relevant and admissible to show his knowledge of his obligation and

his intent to defraud the Government in defeating and evading it. We will not review at length the rule of law which permits the introduction of such evidence in a case in which intent is an ingredient of the offense charged. In *Lloyd v. United States* (5 Cir.), 226 F. 2d 9, we reaffirmed the expression of the doctrine as set forth in the opinion on motion for rehearing in *Weiss v. United States* (5 Cir.), 122 F. 2d 675, 682, 689, where we said:

> "Let us consider the theory upon which such evidence is admissible. The general rule is that evidence of another crime unconnected with the one on trial is inadmissible, but this rule is subject to a number of exceptions, the first of which is that evidence of other offenses by the accused is admissible to show his criminal intent as to the offence charged, where the other offenses are similar to and not too remote from that charged, and where intent is in issue as an element of the offense charged, where the other offenses are evidence of a separate crime tends to explain, illustrate, or characterize the act charged when such act is capable of more than one construction. Another is to rebut a claim of mistake or inadvertence. An exception also applies where the crime charged is one of a series of swindles or other crimes involving a fraudulent intent, or where the crime charged is part of a plan or system of criminal action. It is clearly admissible in prosecutions for obtaining money by false pretenses. The length of time over which an inquiry as to other offenses may extend is within the sound discretion of the trial court."

We think there is no merit in the appellant's criticism of comments made by the trial judge to the jury on the two occasions on which the jury requested additional instructions. From the court's charge as a whole and in the admonition that there could be no conviction without a finding of wilful intent, we think the jury was properly and correctly advised on the function of the jury and also as to the meaning of "wilful" as used in the statute and the indictment. The voluntary addition by the court to a supplemental instruction of the statement "You can recommend as to sentence if you want to, but beyond that you cannot do anything," was not, under the circumstances of the trial, including the charge and the supplemental discussion, calculated to induce a verdict of guilty. Cf. *Forster v. United States* (5 Cir.), 237 F. 2d 617. Moreover appellant's counsel made no objection to this comment by the court. In fact, on a reappearance of the jury seeking additional instructions when Government counsel suggested to the court that it admonish the jury that the matter of sentence was completely out of their hands, appellant's counsel objected and the court left the matter without further instructions.

If the defendant's counsel had any specific objection to the charge as to wilfulness as given it was not called to the court's attention on any of the several occasions afforded them by the court to perfect the charge. The charge as given was fair and clear and contained no prejudicial error.

The remaining points made by appellant here are, we think, not sufficiently significant to merit separate treatment. They have each been carefully considered and are rejected.

The judgment is AFFIRMED.

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No. 1061

In the Supreme Court of the United States

OCTOBER TERM, 1956

MILTON J. HARRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. Appendix A1–11) is reported at 243 F. 2d 74.

JURISDICTION

The judgment of the Court of Appeals was entered April 9, 1957 (R. 256), and a petition for rehearing was denied on May 8, 1957 (R. 275). Petition for a writ of certiorari was filed June 6, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the indictment, which alleged a willful attempt to evade and defeat taxes by filing a false

return, was sufficient to charge an offense under Section 145 (b).

2. Whether the Government's evidence was sufficient to establish a willful attempt to evade and defeat taxes.

3. Whether petitioner was prejudiced by the trial court's statement to the jury that it could recommend as to sentencing, which statement petitioner later approved.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145 (b).)

STATEMENT

On February 27, 1953, petitioner was indicted in the United States District Court for the Southern Dis-

evade and defeat a large part of his income tax for the year 1946 by filing a fraudulent return in violation of Section 145 (b) of the Internal Revenue Code of 1939. The indictment charged that a net loss of $4,839.47 and no tax due was reported on the petitioner's return for the year 1946 whereas his net income was $26,277.23 on which $9,797.89 in tax was due. (R. 1.) On April 3, 1956, after a jury trial, petitioner was found guilty as charged (R. 215–217), and was subsequently sentenced to six months' imprisonment and fined $2,000. (R. 218–219.)

The evidence to support the verdict may briefly be summarized as follows:

Petitioner is an attorney and real estate broker. (R. 30, 57, 177.) He was also president and sole owner of the M. J. Harris Company, an Ohio corporation. (R. 59, 118–123.) In the summer of 1946, he told Revenue Agent Nisenson that he had not filed personal income tax returns for many years. He said that his corporation paid all his personal expenses, and that he had been informed by a previous internal revenue examiner that it was therefore unnecessary for him to file personal returns. Agent Nisenson explained that he had been misinformed, and that he was required to file personal returns. (R. 54, 58–59.)

In October, 1946, petitioner personally received a commission of $45,000 on the sale of a hotel in Florida, and he applied this sum immediately on the purchase of a house in Miami Beach in the names of his wife and himself. (R. 32–35.) In March, 1947, he filed a personal income tax return in Florida, which failed to include the $45,000 commission, and which reported

a net loss with no tax due.[1] (R. 1, 100, 113, 168; Pet. 6.). The commission was, however, reported as the only item of income in the corporation's return, which was filed in Cleveland, Ohio, but it was completely offset by approximately $50,000 in deductible expenditures and by losses carried over from previous years. (R. 30, 174–175; Pet. App. 3.) There was no substantial evidence to indicate that the $45,000 was income to the corporation rather than to petitioner personally.

As further evidence of petitioner's intent to evade taxes, the Government showed that he had claimed expenses amounting to $17,605 on the corporate return, and had then claimed these same expenses as business deductions on his individual return. (R. 97–99.) There was also evidence that numerous purely personal non-deductible expenditures had been claimed on the return as business deductions. (R. 71–72, 137–141, 170–171.)

ARGUMENT

1. Petitioner contends (Pet. 2, 8–13) that the indictment, which charged that he had willfully attempted to evade and defeat his income taxes for 1946 by filing a false and fraudulent income tax return, failed to state an offense within the purview of Section 145 (b), Internal Revenue Code of 1939 (*supra*, p. 2). This contention has been completely disposed of by the recent

[1] The return also stated that petitioner's return for the previous year had been filed in Cleveland, Ohio (R. 168–169), although petitioner had admitted to Agent Nisenson that he had not filed personal returns for years (R. 59).

decision of this Court in *Achilli* v. *United States*, Nos. 430 and 834, this Term, decided May 27, 1957.

2. Equally without merit is the contention (Pet. 3, 13–21) that the Government's evidence failed to establish a willful attempt to evade taxes because the $45,000 commission fee had actually been revealed in the corporation's return. It is true that the fee was reported in the corporate return, which was filed in Ohio, but it was so completely offset there by deductions and losses that no tax appeared to be due. The fee was not reported, as it should have been, in the individual return which was filed in Florida. The result was that petitioner evaded payment of taxes on the $45,000 fee entirely. The jury could reasonably conclude that the revelation in the corporate return was designed to conceal the fact that a considerable amount of taxes was due on the individual return. As the trial judge put it (R. 109), "* * * the man was hiding behind the corporation to avoid paying taxes, * * *". Moreover, there was additional evidence of fraudulent intent in the duplication of deductions and in the misrepresentation of personal expenditures as business deductions (*supra*, p. 4). We submit that the element of willful intent to evade taxes was fully substantiated.

3. Finally, petitioner urges that the trial court induced the jury to find against him by permitting it to make a recommendation as to the sentence. (Pet. 21.) This contention is not supported by the record.

After the jury had been deliberating for over an hour, it requested that it be advised if a "verdict of

guilty without willful intent" could be returned. The trial court properly instructed that, "If there is no willful intent you cannot find him guilty," and added, "You can recommend as to sentence if you want to, but beyond that you cannot do anything." (R. 191.) Petitioner made no objection to this instruction. The following day the trial court again twice gave elaborate instructions on willfulness and other elements of the offense, first at the request of the jury as a whole, and later in response to an individual juror's question. (R. 192–210.) At no time did petitioner request an instruction to correct the remark he now contends induced the verdict. On the contrary, he objected to the Government's suggestion that the jury be instructed that it had no concern with the sentence, stating that "a reduced sentence might reasonably be indicated." (R. 210.) The jury ultimately returned its verdict twenty-three hours after the remark which had allegedly induced the result. (R. 215–216.)

We submit that under these circumstances the verdict was clearly not the result of the trial judge's remark. There was nothing said to indicate that a recommendation of leniency would be acted upon by the judge. The cases upon which petitioner relies are readily distinguishable. In *Demetree* v. *United States*, 207 F. 2d 892, 895 (C. A. 5th), the jury, after informing the judge that they were deadlocked, received some assurance that the punishment would be lenient. And in *Smith* v. *United States*, 230 F. 2d 935 (C. A. 6th), the trial judge's comment obviously led the jury to believe that a lenient sentence would be

imposed. Furthermore, petitioner is in no position to invoke the plain error rule since he affirmatively defended the jury's right to make a recommendation in the face of the Government's request for an instruction that the jury should not concern itself with the sentence. See *Strauch* v. *United States*, 213 F. 2d 805, 808 (C. A. 6th), certiorari denied, 350 U. S. 836.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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